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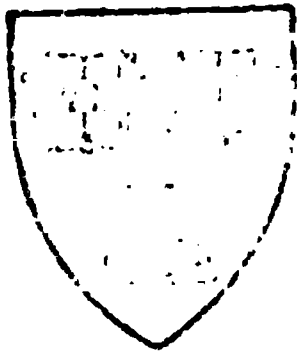
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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

CITY OF NEW YORK.

BY

JOHN DUER, LL.D.

ONE OF THE JUSTICES OF THE COURT.



VOLUME I

ALBANY:

**W. C. LITTLE AND COMPANY,
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JUSTICES
OF THE
NEW YORK SUPERIOR COURT,
DURING THE TIME OF THESE REPORTS.

THOMAS J. OAKLEY, CH. J.,	}	JUSTICES.
LEWIS H. SANDFORD,*		
JOHN DUER,		
WILLIAM W. CAMPBELL,		
ELIJAH PAINE,		
JOSEPH S. BOSWORTH,		
ROBERT EMMET.†		

* Mr. Justice SANDFORD died on the 25th of July, 1852, and the vacancy occasioned by his death was not supplied until November following.

† Judge EMMET was appointed by the Governor, and elected by the people, to supply the vacancy created by the death of Judge SANDFORD. He took his seat during the second week of November term, 1852.

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C A S E S
ARGUED AND DETERMINED
IN
THE SUPERIOR COURT
OF THE
CITY OF NEW YORK.

OAKLEY v. ASPINWALL and others.

Where a suit has been commenced against two persons as joint debtors, the process being served on only one of them, and the plaintiff has proceeded to judgment under the joint debtor act, and proceedings are subsequently instituted against both the defendants, under the act respecting attachments against absconding, concealed, and non-resident debtors, the cause of action, or demand in such proceedings, does not *arise upon the judgment* within the meaning of that article of the statute (2 R. S. 3 §§ 1, 3, 4).

bond given to discharge an attachment against the property of two non-resident debtors, was conditioned to pay the amount due on account of any debt claimed and sworn to "by the attaching creditor." On the trial of an action upon the bond it appeared that the creditor had claimed in his application for the attachment, and had sworn to, a demand against both the debtors "*arising upon a judgment*" in his favor. The record was introduced, from which it appeared that the judgment was obtained under the joint debtor act, the process having been served on only one of the debtors, and other evidence was given, tending to establish the joint liability of the one not served. *Held*, that the attaching creditor's demand against both the debtors did not arise upon the judgment, within the intent of the act respecting attachments; and therefore, that the action could not be sustained upon the evidence.

Bosworth, J. dissented.

Where, upon appeal, the appellate court pronounces a judgment clearly ascertained, and directly upon a given point, deciding that the court below erred in its decision upon that point, such judgment is binding upon the subordinate court; notwithstanding the majority of the judges of the appellate court concurring in a reversal have arrived at the conclusion by diametrically opposite reasoning, and on inconsistent views of the law. Bosworth, J. dissented.

(Before SANDFORD, DUER, and Bosworth, J.J.)

April 14, 15; May 15, 1852.

D.—I.

Oakley v. Aspinwall.

THIS was an appeal from a judgment entered upon the direction of a single judge of this court, after a new trial had been had, in pursuance of the decision of the Court of Appeals. The case will be found reported in its various stages, and in the different courts, in 2 *Sandford's Sup. Court Reports*, 7; 4 *Comstock*, 514; and 10 *N. Y. Legal Observer*, 79. In those volumes, and in the opinion of the Court, delivered by SANDFORD, J., and the dissenting opinion of BOSWORTH, J., the facts will be found amply stated. Mr. J. Duer, in the court below, gave the following reasons for nonsuiting the plaintiff:—

DUER, J.—I hold myself bound by the former decisions of this Court, and also fully concur in them, as to the right of the plaintiff upon the questions involved, except so far as I am constrained to follow what I may deem obligatory upon this Court, in the recent decision in the Court of Appeals. That decision certainly does not settle that an action of debt would not lie against Young and Baker upon this judgment; but leaves that an open question in the Court above, without disturbing the rule settled here in favor of the action. But it has settled against the plaintiff the question which his counsel now requires me to decide in his favor. It has settled that the record now offered in evidence does not supply the proof that must be given in order to sustain his action, namely, that the demand which he seeks to recover arose upon a judgment. It may be doubted whether I ought to have listened to the letters that have been read, so far as they differ from the printed report, but even these letters show conclusively that five of the Judges arrived at the conclusion that the plaintiff's demand, as against Baker, arose upon the original contract, and not upon the judgment, and that upon this ground they concurred in reversing our judgment and ordering a new trial. It therefore cannot be denied that the Court of Appeals has said that the evidence which I am now asked to receive ought to be excluded. It may be true that its members arrived at this result by different processes of reasoning, and that the reasons, which have been given when separately considered, are not entirely conclusive, and when compared, are not easy to be reconciled, but were such my own conviction, it is a conviction upon which, as a judge of a sub-

ordinate tribunal, I should have no right to act. I should violate my own duty were I now to make a decision in direct hostility to that which the Court of Appeals, whether rightly or erroneously, has certainly pronounced. I must therefore say that this record is not evidence that the plaintiff's demand arose upon a judgment, and, as a necessary consequence, that he must be nonsuited.

I am satisfied that it is expedient that this decision should be made in the present stage of the cause, since if it shall be taken again to the Court of Appeals, it will go there upon the single question upon which the nonsuit is founded, disembarrassed of the question as to Baker's partnership, which seems to have influenced some of the judges above, and might again, if the plaintiff were allowed to obtain a verdict and judgment, and leave the defendant to appeal. It is possible that the Court of Appeals may be disposed to reconsider its decision, and that the learned and able arguments which, situated as I am, I have been constrained to reject, may there be successful.

H. P. Hastings, and *S. Jones*, for the plaintiff, on moving for a new trial, made and argued the following points:—

I. The plaintiff's demand did arise on judgment as against both Young and Baker. 1. The plaintiff's right to recover in this action is identical with his right to recover the demand claimed and sworn to against Young and Baker (2 R. S. 12, § 57, Pr. Mullett, J. in this case, 4 Com. 524). 2. It is the character of the demand and not the evidence that is required to be stated in the petition, to give jurisdiction. (2 R. S. 3, § 3.) 3. "Arising on a judgment rendered within this State," means on any of the judgments authorized by statute to be rendered in this State, including a joint debtor judgment. 4. Whether the judgment of itself proves the demand upon it, has nothing to do with the question. The statute had a right to say, that an action might lie on the judgment, if certain other proof was made, and has said so, by providing for the force and effect of the evidence in such action. (2 R. S. 377, § 2. 11 Howard, 165, *Ketcham v. Darcy*, 7 Paige, 449.) 5. An action of debt does lie against both debtors upon the proof offered. Pr. Gardner, Gray, Jewett, and Paige in the Court of Appeals in this

Oakley v. Aspinwall.

case, and all prior authorities. 6. An action upon judgment, is a demand upon judgment; and the action of debt upon the judgment, arises upon the judgment, for it could not exist before, and no other action can lie for the same or the prior debt, at the same time. Therefore, the demand against the debtors arises on the judgment. It is but one demand against both, and must be on judgment against both or neither.

II. The plaintiff was equally entitled to recover, whether his demand, in the technical sense, was one arising upon contract or upon judgment. 1. 2 R. S. § 3, allowed the attachment on the application of any creditor "having a demand arising upon contract, or upon a judgment, or decree rendered within this State," and the plaintiff certainly had such a demand. 2. Section 4, required the affidavit to specify the sum due; but not whether the debt was upon judgment or upon contract, as either authorized the attachment. 3. It has been held, that the nature of the indebtedness must be stated, *i. e.* so far as to show the claim to be one within the statute. 4. A statement in the alternative, that the debt arose either upon contract or upon a judgment or decree rendered within this State, would have been sufficient within the statute and the principle of the decided cases. 5. The bond given on dissolution of the attachment is a substitute for the remedy of the creditor against the attached property, and intended to be at least commensurate with such remedy. (2 R. S. 11, § 54 to 57 inclusive.) 6. If the attaching creditor had sworn to a debt on contract, and the attachment was not dissolved, he could prove his demand though it turned out to have been on judgment, and so *vice versa*; for all the estate is to be distributed amongst all the creditors; and as the affidavit gave jurisdiction, the attaching creditor would not lose his debt by a quibbling variance. 7. The condition of the bond is to pay the amount justly due and owing "on account" of any debt claimed and sworn to; and by recurring to § 4, which required only the amount of the debt to be sworn to over and above all discount, it is obvious that the words "any debt" in § 55, mean the sum claimed and sworn to, and not the kind and quality of the debt. 8. The words "on account" of any debt, &c., show that the form of the debt need not be the same, and that anything due

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on account of the debt claimed or sworn to, or in other words, the claim of the creditor was intended to be secured. 9. It was not required that the affidavit should be as particular as a declaration, and that the bond should provide to pay any debt in the same form as the one sworn to, but only to bring the creditor within the statute, so as to give jurisdiction and to fix the sum which must be secured by the bond in order to dissolve it, &c. 10. No misdescription of the debt should, therefore, be held to prejudice the creditor, unless it was such that the debtors could be misled, as to what demand or claim in fact was intended, and thus induced to give the bond when it would not otherwise have been given. 11. Confessedly, the plaintiff had a judgment to all intents and purposes, as against Young, for the demand in fact claimed and sworn to; and if Baker was the partner of Young, and jointly contracted the debt upon which the judgment was obtained, he must be deemed to have known what his partner knew in respect to the debt, and consequently knew of the judgment, and that the plaintiff claimed the debt for which it was recovered; and he could not, therefore, have been misled. 12. If the law had required the affidavit to set forth the demand, as in a declaration, and it had stated the judgment as the declaration does, to have been recovered for non-performance of certain promises and undertakings of Young & Baker, then lately made, even if the judgment had been void for want of jurisdiction, the claim would have remained good upon the contract; and as the law did not require this particularity, the affidavit is as good without it as with it. 13. Being entitled to recover this debt under this bond, as a question of pleading and evidence, all the issues formed upon the breach assigned, would have been well enough proved by the evidence offered; and besides the objection upon which the evidence was excluded, was put upon the ground, not that the proof would be a variance from the breach alleged, but that it would not prove such a debt as claimed and sworn to in the petition and affidavit. If the objection had been for variance, the pleading might have been amended, and hence that objection is obviated. 14. There was no substantial variance requiring any amendment, even if the demand technically did arise on contract as to Baker; for the second plea to the count is *null tiel record* to the aver-

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ment of the judgment, recovered upon promises of Young & Baker, which issue is held proved by the evidence offered, in *Mervin v. Kumbell*, and by Jewett and Paige, two of the three voting to reverse ; the fourth and fifth pleas take issue on Baker's liability, and the sixth upon the debt claimed and sworn to being due, and not upon the judgment ; and as this last was the only issue which need have been presented or taken, any evidence showing a right to recover under the bond sustains the issue. 15. This point never having been before raised, cannot be deemed settled by the reversal. (*U. S. v. Moore*, 3 Cranch, 172 ; *Durousseau v. U. S.*, 6 id. 317, 5 Peters, 219.)

III. The Court of Appeals, in deciding this case, or rather in reversing the judgment, have held nothing, and settled nothing, to the contrary of either of the above propositions. 1. No opinion of the court was given in the case, because no principle was agreed on. 2. It was not the court, but five judges individually, who said the demand did not arise on judgment ; and they said so, not because they agreed, but because though they disagreed, what the law was, as to an action of debt on the judgment arising as against the debtors, still two who said it did not, did not know that a demand arose when an action did. 3. The court might have said, "No action arose or would lie upon the judgment ;" and if they had, that would have settled the matter ; but it did not say so ; and only three judges did, out of eight ; so it might have said "an action of debt on the judgment does lie, by virtue of the statute ; but still, it was not enough that the plaintiff could have maintained an action, in the form he swore to his demand, against the debtors, but he should have sworn to a demand on contract, though he proved one on judgment ;" but it did not say so ; Jewett and Paige alone said this ; and it cannot be deemed immaterial whether three others concurred with them or not. The court did say, "the judgment is reversed, and a new trial ordered ;" and it said no more. This appears by the record and remittitur, which also show, that nine or more distinct points were raised and presented for the adjudication of the Court of Appeals, the decision of any one of which for the appellant would have caused the reversal. This record is the only authoritative direction to the court below. (*Davis v. Packard*, 10 Wend. 50 S. C., 6 Peters, 41, 7 id. 276 ;

4 Hill, 271, *Hamford v. Archer*.) 4. No case is conclusive authority, except as to those points which appear by the record of the judgment to have been necessarily decided, in and by the judgment; and no amount of opinions delivered, not by the court, or at the time of the judgment, but got up and reported afterwards, by judges on their own responsibility, can be regarded as authority, for any purpose; particularly where, as in this case, they do not even come under the sanction of an official reporter. (*Warner v. Beers*, 23 Wend. 103; *Gifford v. Livingston*, 2 Denio, 380; *Bridge v. Johnson*, 5 Wend. 342; *Mackie v. Cairnes*, 5 Cow. 547; 11 Wend. 504; 7 Barb. 279; 4 Hill, 197; *Rome on Judgments*, 20, 132, 3; 17 W. 574; 20 W. 159; 26 W. 415.) 5. This court cannot say, the law is that no action of debt will lie on this judgment, for the cases and the statute are the other way; and but three judges of the Court of Appeals say so. It must say, the law is that an action of debt does lie upon the judgment. That being so, it cannot say, the plaintiff must swear to a demand on contract, when he could establish no demand as against the debtors, except on judgment; for but two judges of the Court of Appeals have said so. 6. If the plaintiff should attach for this demand to-morrow, and swear to a demand arising on contract, this case would be no protection against his being defeated; for when the case is cited as authority, it will be answered that no case is authority independent of the principle upon which it is decided. And, though five judges said the demand did not arise on judgment, three of them said so only, because they held that no action would lie upon it; and admitted the principle, that if the plaintiff could recover in debt on the judgment, the demand did arise on it. Their opinion has not prevailed, and is not a rule of law; therefore their conclusion goes for nothing. The other two say, the demand does not arise on the judgment, but an action does; but their opinion did not prevail, and therefore their conclusion goes for nothing; and the case settles nothing. (Pr. *Verplank*, Senator, in *Priest v. Cummings*, 20 Wend. 361; *Jones v. Mason*, 3 Com. 375; this case 3 id. 569; *Supervisors of Onondaga v. Briggs*, 2 Denio, 28; *Butler v. Van Wyck*, 1 Hill, 462; *Moss v. McCullough*, 7 Barb. 289; Pr. Bronson J. in *Vance v. Phillips*, 6 Hill, 437; 9 Cow. 221.) 7. If the case settles for law, that

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the demand does arise on contract, it must also settle that no action of debt will be upon the judgment (with but three judges in favor of the proposition), or it must also settle the greater absurdity, that the action arises on the judgment, but the demand on the contract (with but two judges in favor of the proposition); and as there is just as much reason for holding that it settles one as the other, it cannot be held to settle either. 8. His Honor the judge has therefore erred in holding, that he must declare not what the law is, as enlightened by the principles held by the Court of Appeals, but what those particular five judges of that court would will to do, if they sat here; and a new trial should be granted. 9. The necessary effect of five judges having the power to reverse, each arriving at the same conclusion, but in consequence of assuming different and distinct points, contrary to the law as held, and settled in the court below, but in neither of which a majority of the court concur, must be that the judgment be reversed, and a new trial ordered, leaving all the points open; and what the effect of the reversal as authority in such cases is, cannot be settled by the case itself, but is open for original adjudication. 10. The judges voting to reverse did so upon questions which were open in that court, and upon which they might act according to their own opinions; but in this court the law upon each question is settled the reverse of those opinions; and neither of them is the opinion of the court. If the same judges had sat in this court, they must have held the other way, as this court must, in obedience to the law as settled here. (5 Peters 292, *Smith v. U. S.*) 11. This court has once given a judgment according to settled law. It has been reversed without overturning the principle upon which it was based. They should hold fast to their principles till clearly overruled, and not defeat justice upon a doubtful construction of five opinions of judges.

IV. If necessary, we maintain, without hesitation, that the opinions of the five judges against the plaintiff are so directly in the teeth of the law, that no court, from the Court of Appeals to a justice of the peace, should regard them as any authority whatever. 1. Bronson's opinion is directly against the letter of the statute, which sanctions an action on the judgment, by providing for the effect of the judgment, as evidence in the

same action, as against debtors served and not served (2 R. S. 377, § 2). 2. He admitted, in *Merwin v. Kumbell* (23 Wend. 293), that under the old statute the law was too firmly settled to be disturbed, that the action did lie. 3. He as distinctly admitted, that if the defendant not served had denied his liability in the prior cases, it never would have been held that the judgment was *prima facie* evidence; which means, that it never was so held; for it could not be held evidence when no evidence was required. 4. He admitted that there was no ground for holding differently under the Revised Statutes from the former decisions that debt would lie, except that the old statute gave greater effect to the judgment than the new. 5. In *Bruen v. Bokee* (4 Denio, 56), the Supreme Court held, that the old statute must be held to have no greater effect than the new, and that the statute of limitation might be pleaded to the original cause of action. 6. The majority of the court in *Merwin v. Kumbell* actually judicially decided the point that debt did lie under the Revised Statutes, and that a plea that the defendant was not served and did not appear was bad on demurrer. 7. This was a point of no practical importance, as he admitted in that case: and if so, of course there was no pretence for overruling the decision after ten years; yet he and Mullet are for overruling it, though he asserts, mistakenly, that the point was not necessarily decided. 8. Jewett's opinion holds, that the plaintiff had an action of debt on the judgment. 9. An action is defined "a legal demand of one's right." 10. The plaintiff's legal demand of his right to recover on this judgment accrued when he recovered the judgment, and arose therefore upon the judgment. 11. The holding that, after the plaintiff obtained this right of action on the judgment, he still had a demand (that is, a right of action) upon the original contract, and that he must swear that his demand then was one arising on contract, is too grossly absurd to need refutation; and though solemnly put forth by J. Jewett, is not assented to by either Bronson or Mullet, in their opinion for reversal. Judges Jewett and Paige stand alone in this new position. 12. As their opinion confirms the authority of *Merwin v. Kumbell*, that the record, and evidence of joint liability, justify a verdict for the plaintiff upon *nul tiel* record pleaded to a declaration

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in debt in the common form, they sanction a verdict for the plaintiff upon the same issue, upon the breach assigned in this cause, but would require a verdict for the defendant under the sixth plea of *nil debet*, and then the record would read that the plaintiff did recover the judgment against Young & Baker upon their joint promises, of which they were convicted as appeared of record, and which was not paid, but still Young & Baker were not indebted to the plaintiff on account of the debt claimed and sworn to, though that was claimed on the judgment. 13. If the opinion of the whole court may be overruled when clearly contrary to law, as held by Judge Bronson in *Baker v. Van Wyck* (1 Hill, 462), and by Harris J. in *Baker v. Lorillard* (4 Com. 257), with how much more force may the court be urged to disregard the individual opinion of judges, not concurred in by a majority of the court?

V. The plaintiff had a right to give any evidence which proved, or tended to prove, either issue joined; and the exclusion of competent evidence for such purpose was erroneous, and entitles the plaintiff to a new trial. 1. To prove the issues formed by or upon the third, fourth, and fifth pleas to the second count, evidence of Baker's joint liability with Young for the debt upon which the judgment was recovered, was all that was required; the exclusion of Young's deposition offered to prove these issues was erroneous; and the plaintiff had a right to take his exception, and stop there. The court might dictate the order of evidence to prove an issue, but had no right to dictate which issue should be proved first. 2. Under the second plea to the second count, the record, with other evidence of the joint liability of Baker, was admissible, even according to the opinions of two of the judges voting to reverse, and the exclusion of it was erroneous, and entitles the plaintiff to a new trial. 3. Under the issue formed by the sixth plea to the second count, the evidence offered was admissible (if any evidence was required), and the exclusion of it was erroneous.

VI. The plaintiff had a right to a verdict on all the issues he did or could prove, and a nonsuit was improper, even if one of the issues should have been found against him. The plea may have been bad after verdict, and on trial or bill of exception the sufficiency of the pleadings will not be examined.

J. P. Hall, for defendants, declined to reply, considering the decision of the Court of Appeals as conclusive.

SANDFORD, J.—The condition of the bond on which the suit is brought is, that the defendants shall pay the plaintiff the amount justly due and owing to him by John W. Baker and John Young at the time he became an attaching creditor, on account of any debt claimed and sworn to by him in his application for the warrant of attachment against Young and Baker.

The plaintiff's petition for the attachment set forth that the plaintiff had a demand against Baker and Young, arising upon a judgment rendered against them, in his favor, in the Supreme Court. The affidavit of the plaintiff, annexed to the petition, stated that the facts set forth in the petition were true, and that Baker and Young were indebted to him in a sum specified, arising upon a judgment rendered in the Supreme Court against them, in favor of the plaintiff. In order to prove that he had such a demand against Baker and Young as is described in the condition of the defendants' bond, the plaintiff read in evidence the record of a judgment against them, in his favor, in the Supreme Court, corresponding in date and amount with that described in the petition and affidavit, but which disclosed on its face that Baker was not served with process, and that he did not appear in the suit. It was a judgment entered against two joint contractors, pursuant to the statute relative to suits against joint debtors, on service of process upon one only.

The same evidence was given on the former trial in this court, and the defendants then objected that the plaintiff had not proved such a demand against Baker and Young as was claimed by him in his petition for the attachment. We overruled the objection, and our judgment having been removed to the Court of Appeals, it was there reversed and a new trial ordered. (4 *Const.* 513.)

From the published opinions of the judges of that court, delivered on deciding the cause, as well as from the letters of certain of the judges read to us on the argument, it is perfectly clear a majority of that court decided that the record of judgment produced in evidence at the trial did not, with the other

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testimony given, prove that the plaintiff, at the time he became an attaching creditor, had such a debt against Baker and Young as that claimed and sworn to by him, in his application for the attachment. In short, that the testimony on the part of the plaintiff did not support the issue made by him on this point in the pleadings.

On the last trial, the plaintiff relied upon the same testimony, and no other, to maintain his suit.

Can we, in the face of the decision of the Court of Appeals, hold that the evidence proves this issue in favor of the plaintiff?

Were we at liberty to act upon our judgment, we should have no hesitation in deciding as we did before. Our opinion then expressed has been strengthened by the perusal of the opinions pronounced in the appellate court. It is also undeniably true, that those opinions, concurring in a reversal of our judgment, are irreconcilable in reasoning, if not in principle, and that not more than three of the eight judges of that high tribunal have concurred in any principle applicable to the case.

But in our view of our duty, these circumstances do not relieve us from the effect of their decision. A majority of that court has pronounced a judgment, which must be, to us, the law of this case. It is a judgment clearly ascertained, directly upon the point in question; and although the five judges may have arrived at the conclusion by diametrically opposite reasoning, and on inconsistent views of the law, they have concurred in saying, that we erred in holding the record of the plaintiff's judgment, in connexion with the other testimony, to be evidence of a demand against Baker and Young, arising upon judgment.

We think we should be wanting in that deference to authority, and that respect which a subordinate court should always manifest towards a higher tribunal, if we should take it upon ourselves to decide this cause contrary to the result in which those judges concurred.

Yielding, therefore, to the force of a superior authority, we must affirm the ruling at the trial made in accordance with the decision of the Court of Appeals.

The motion for a new trial must be denied.

DUER, J. concurred.

BOSWORTH, J., *dissented*.—This is an appeal from a judgment entered upon the direction of a single judge of this court. The action is brought upon a bond given pursuant to §55 of 2 R. S. P. 12, to procure the discharge of an attachment which had been issued at the instance of the plaintiff on the 8th of September, 1837, against John W. Baker and John Young as non-resident debtors.

The application for the attachment, and the affidavit verifying it, stated that Oakley had “a demand for \$22,492 ⁰⁰/₁₀₀ over and above all discounts arising upon a certain judgment rendered in the Supreme Court of judicature of the people of the State of New York, against the said John W. Baker and John Young, in favor of the said Charles Oakley,” and that Baker and Young were indebted to Oakley upon such judgment in the said sum over and above all discounts.

The bond bears date January 10, 1838, and is conditioned to pay the amount justly due and owing by Baker and Young, “on account of any debt claimed and sworn to” by each attaching creditor, with interest, costs, &c. The defendants pleaded, *inter alia*, as to the judgment *nul tiel* record. That Baker was not served with process and did not appear in the suit, and that the promises on which the judgment was recovered were the promises of Young alone, and not of Young and Baker jointly, and that Baker was not indebted to the plaintiff in the sum claimed or in any other sum. The plaintiff replied that the promises were made by Young and Baker jointly; and that they were indebted, &c.

On the trial the plaintiff produced in evidence the record of a judgment rendered in the Supreme Court in his favor as plaintiff, against Young and Baker as defendants, upon promises made by them as partners. The judgment was rendered, and the record of it was signed and filed in October, 1834. The record showed that Young only was served with process, and that Baker did not appear in the suit. The plaintiff further offered to prove, in connexion with the judgment and independent of it, that the promises on which the judgment was recovered were made by Young and Baker as partners, and their liability to the amount recovered. The judge before whom the cause was tried, on the evidence being objected to by the defen-

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dants' counsel, excluded it, and held that it did not tend to show that the plaintiff had a demand against Baker and Young arising upon a judgment. The plaintiff excepted to the decision. Having no other evidence to establish that fact, the judge nonsuited him, which decision was duly excepted to.

The main question presented is this: Has a person, who owns a judgment recovered by him, against two partners on promises made by them as such, in a suit in which only one was served and the other did not appear, and to whom the amount of the judgment is justly owing by such partners, a demand against them, arising upon a judgment, within the meaning of those terms as used in 2 R. S. P. 3, §§ 1, 3, and 4?

The act in relation to attachments against absconding, concealed, and non-resident debtors provides in § 1, that the property of "a debtor" may be attached, first, "whenever such debtor, being an inhabitant, &c., absconds, conceals himself, with intent to defraud, &c.; second, "whenever any person not being a resident of this state shall be indebted on a contract made within this state, or to a creditor residing within this state, although upon a contract made elsewhere."

It will be seen that the only cases in which § 1 authorizes the issuing of an attachment against a non-resident, are those where he is "indebted" upon "a contract." This section specifies the class of cases in which an attachment may issue against any person. The language employed to designate them was undoubtedly designed to be as comprehensive as that of § 3, which declares by what creditors the application may be made. The latter section provides that it may be made by any creditor "having a demand against such debtors personally, whether liquidated or not, arising upon contract, or upon a judgment or decree rendered within this State."

§ 4. The application must be in writing, verified by the affidavit of the creditor, in which must be specified the "sum in which the debtor is indebted over and above all accounts."

§ 55. The bond to procure a discharge of the attachment must be conditioned to "pay to each attaching creditor the amount justly due and owing by such debtor to him, at the time when he became an attaching creditor on account of any 'debt' so claimed and sworn to by him with interest thereon."

§ 58. In a suit on the bond “the prosecuting creditor shall establish his ‘demand,’ in the same manner as in an action against the debtor.”

It is obvious from these sections that the persons who may attach, as well as those whose property may be attached, and the causes for which attachments may issue, are not expressed by words employed in a technical sense. The only non-residents made liable by § 1 to attachments are those indebted upon “contract,” while § 3 authorizes a person having a “a demand” upon “contract” or “a judgment” to obtain an attachment; and § 55 provides that the bond shall be conditioned to pay the “debt,” claimed and sworn to.

The language of § 3 also authorizes a creditor having a demand arising upon judgment, or decree, though unliquidated, if such a thing can and does exist, to obtain an attachment. The phrase “whether liquidated or not,” upon all rules of grammatical construction, is as applicable to the words a “judgment or decree,” as to the words “upon contract.” That one person may have an unliquidated demand against another arising upon judgment, cannot be denied. In suits in which, after a lapse of four days after the entry of a defendant’s default for not pleading, interlocutory judgment has been entered, or a judgment that the plaintiff recover his damages by reason of the premises, and that a writ of inquiry issue to assess and ascertain them, the plaintiff, from the time of entering interlocutory judgment, may be said to have a demand arising upon judgment. This would probably be true in respect to the demand of a plaintiff prosecuted thus far; whether the suit was on a demand arising *ex contractu*, or *ex delicto*; and it would be a demand unliquidated. And yet, in the supposed case, there is no judgment record to furnish evidence of liability; no action would lie on the judgment, and all the proceedings had, would at most show an adjudged liability upon the cause of action set out in the declaration, and *per se*, on the execution of a writ of inquiry, would be only evidence of the plaintiff’s right to recover nominal, or six cents damages. Graham Pr. 794, 798–9, 786.

In this case the plaintiff had a judgment, in form, against both defendants, recovered as prescribed by law, upon promises made

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by Young and Baker as partners, and on which there was justly due to him on the promises, and the judgment, one, or on the other, or somehow and in some sense on both, the amount claimed in the application. Such must, for the purposes of deciding the appeal, be held to be the facts of the case, as the record was in fact produced and evidence was offered to prove that the promises were in fact made by them as partners, and that the amount claimed was justly due. No published opinion has intimated any objection to the plaintiff's right to an attachment against Young and Baker as being jointly indebted, or that on the facts as found by the judgment reversed, or offered to be proved on the last trial, he has not a demand against both, on which the two are jointly liable. It is insisted that he had no demand against Baker arising on a judgment, and that to recover he must have against both a demand arising on a judgment recovered against the two as co-defendants in a suit in which both were served or appeared. That the plaintiff, on the facts proved or offered to be proved, has a demand against both, is conceded. Can any one tell on what it arises, or what is its nature, as to both or either defendant? Does it arise on contract as to both, or on contract as to Baker and upon judgment as to Young? Is there any joint liability left? Or has it become severed, and if so, is one now separately liable on a judgment, by which the original cause of action has as to him been extinguished, and is the other now liable separately on a contract joint when made, but now transformed by operation of law into his several contract, unimpaired as to him, but extinguished as to his co-partner by the judgment recovered? Assume it to have been decided by the Court of Appeals that as against Baker, the plaintiff showed no demand arising on judgment, but one arising on contract, then how does the case stand? He showed a demand arising on judgment, as against Young. No one denied that, nor could. Process had been served on Young personally; the declaration was on promises made by him and Baker as partners. He gave a *cognovit*, and judgment was entered against him, and duly and fully perfected. This judgment had and has all the effect upon the original contract, so far as Young is concerned, that any judgment had or can have, unless it is otherwise provided in the statute authorizing the

judgment. The statute has no provision on the subject. Young could never again be sued on the original cause of action. The judgment extinguished it as to him. Of this there can be no question. It also extinguished it as to Baker, so that afterwards he could not be sued either separately, or jointly with Young, upon the original cause of action, unless the joint debtor act provides either in terms or by necessary implication that Baker may be so sued. It does not so provide in terms. If such is by necessary implication the meaning of the act, then does it mean that he may be sued separately on the original cause of action, or that he may or shall be sued upon it jointly with Young? May he insist on a joint action, or that a joint action would not lie?

Some propositions may be deemed to be well settled so far as the judicial decisions of the courts of this state are concerned. One is, that where one or more of several joint debtors are sued, those sued may plead the non-joinder of the others in abatement, but are not obliged to do so. If they make no such plea, the plaintiff may recover against those sued, though it appears on the trial that the promises were made by them and others jointly. But if the plaintiff takes judgment against those sued, instead of submitting to a nonsuit and bringing a new suit against all, the judgment extinguishes all right of actions against, and all liabilities of those not sued. This consequence follows, whether he knew at the time or not that others were jointly liable with those sued. It is also settled that whenever the right to maintain a joint action against all upon the original cause of action is once suspended or lost, each and every of the joint debtors may set this up as a bar to a suit on the original cause of action, whether it was produced by the act of the party, or by operation of law at the instance and by the agency of the plaintiff. As to the first proposition, *Robertson v. Smith*, 18 J. R. 456; *Gibbs v. Bryant*, 1 Pick. 118; *Penny v. Martin*, 4 J. Ch. R. 566; *Besley v. Palmer et al.*, 1 Hill, 482, are in point.

The second proposition is illustrated by the class of cases which hold that taking from one partner his specialty obligation for a partnership debt, merges the debt, extinguishes all remedies against the partners jointly, and all liability of the partners

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not executing it. (*Clement v. Brush*, 3 J. C. 180; *Tom v. Goodrich*, 2 J. R. 213.)

It has been held that releasing one of two joint debtors from a debt, extinguishes it as to both, and all liability of each, and that this result will follow against the actual intent of the parties, if the instrument be a technical release, though executed for the purpose, in fact, of making a separate compromise with *one* only, under the act of 1838, p. 243, and with a view of retaining the original liability of the others. (*Bronson v. Fitzhugh*, 1 Hill, 185; *The Bank of Poughkeepsie v. Ibbotson*, 5 Hill, 461.)

It has been held that the arrest of one of several joint debtors on a *ca. sa.*, and his subsequent discharge by consent of the creditor, extinguishes the judgment as to all the debtors. (*Ransom v. Kirby*, 9 Cowen, 128; *Lathrop v. Briggs*, id. 171; *Yates v. Van Rensselaer*, 5 J. R. 364.)

On principle and authority it is clear that a judgment recovered against one of several joint debtors extinguishes all liability upon the contract, and all and every right of action upon it against every party to it. In this case a judgment has been recovered against both Young and Baker in form. Its effect as a judgment, so far as Young is concerned, is the same in all respects as if he was the only party defendant in the action. He cannot be again sued on the original cause of action. If it be insisted that he can be, then a proposition is insisted upon, which is unsupported by any precedent or known decision, is in conflict with settled principles and a series of adjudged cases, and which finds no countenance in any practice known to the profession, or hinted at in any treatise, upon any branch of law or of practice. If, then, a creditor sues only one of the joint debtors, and takes judgment against him, he loses all claims and rights of action against the others. If he makes all parties to the suit, serves but one, and the others do not appear, and then takes judgment against only the one served, the judgment will be reversed for that cause. (*Nelson v. Bostwick*, 5 Hill, 37.) Unless, therefore, the creditor chooses to relinquish all right of action against some of the debtors, he must make all parties: if he omits to make all of them parties,

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he may be coerced to do so by a plea in abatement. If he makes all parties, then, although only a part are served, he not only may, but must take a judgment against all. Having recovered judgment against all, what has he acquired? What has he lost? What remedies by action are left to him? Is there still a joint indebtedness of both? If so, is it the indebtedness of judgment debtors, or of mere promissors under no liabilities except as parties to a contract? May both be jointly sued again upon the original cause of action? Is it possible that they can be? It seems impossible that they can be again so sued, unless the joint debtor act so declares, for the reason that, if in legal effect the judgment is one of common law, force, and validity, as against the one served, that consideration alone extinguishes all right of action upon the contract. Did not the legislature intend that any and all future actions should be upon the judgment, and only that? That the creditor, instead of having a contract, should, after the recovery against the joint debtors, have a judgment perfect in form against all, of conclusive obligation upon those served or appearing, and as against the others, as inconclusive in character as the paper writing purporting to be the promissory note of all, or other contract, whatever it may have been, on which the judgment may have been recovered. In this view the legislature substituted, as against those not served, a judgment in form, in lieu of the alleged promises, or written obligations, on which it purports to have been founded. As against those served or appearing, it actually merged in this judgment, and extinguished all liability upon such alleged promises or written obligations. This trenches on no settled principles, does not convert joint liabilities into several ones, does not affect any right of those not served, retains the joint indebtedness, and leaves it to be enforced by known and appropriate remedies, which have been taken in confident security by the profession for half a century. The only anomaly in the whole matter is this: While the judgment is the same in form as against all, and is of conclusive obligation as to some, as against others, if it is to be enforced against, and collected of them, it must be proved in a suit upon it, that they jointly, with the other defendants, made the promises, or entered into the contract, on

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which it is founded. So in a suit on a paper writing, purporting to be the joint contract of several, the production of the writing amounts to nothing; but when proved to have been executed and delivered by all, it is established as their contract, and their liability upon is the consequence. A joint debtor judgment, in effect, declares that the defendants made certain promises jointly, that they have not performed them, that the plaintiffs have sustained damages to a sum named, and adjudges that he recover that sum of all the defendants. As to such judgment, the statute declares, that as to those not served nor appearing, the plaintiff, when seeking to recover upon it, shall prove all the facts essential to create a liability, which the form of the judgment assumes to have been established, and having done this, he may recover upon it, as he might on a paper purporting to be a promissory note of the parties, on proving that it is such. If this be so, then why may it not be said that he is a creditor, having a demand against both, arising upon a judgment? He has, in fact, a judgment perfect in form, the statute denominates it a judgment; and if he may sue upon it as a thing properly called a judgment, and recover upon it as such, on giving certain proof, then why may it not be said that his demand arises upon a judgment? More must be proved as against some of the defendants than against the others; but this is but a question of evidence. The words, "A demand arising on judgment," as here used, would not seem to mean anything more or less than that the creditor has a judgment against the alleged debtor, on which he claims he can establish a right to recover the sum which he swears to be due from them. This is all that can be meant in this statute by the expression, having a demand arising on contract. The perplexity felt upon the subject, as it seems to me, arises from the idea naturally presenting itself to the mind, imbued with the principles of the common law, that a party cannot be said to have a judgment and a demand arising upon it, if he is obliged to do more to establish both facts than to produce from the files of the proper court a record of the alleged judgment. But the statute says he may, in a certain case, have a judgment against several in form. When he sues upon it, it shall conclude such of the parties defendants as were served, or appeared

in the action. To recover upon it against the other defendants, he must not only produce the record of the judgment, but prove that they jointly promised, with the others, and that the amount recovered is due. These extrinsic facts being proved, he shall have from the judgment itself and the other evidence a recovery from them jointly with the others, of the sum awarded by the judgment.

The proof made shows that the affidavit of the attaching creditor was true: that he had a right of action on this judgment, and was entitled to recover upon it the sum for which the attachment issued. He was none the less a creditor by judgment, and it was none the less true that he had a demand arising upon the judgment, because he had to prove other facts besides that of the recovery of the judgment itself, so long as in fact he had a judgment against both, on which an action would lie against both, and on which, as matter of right, he could show himself entitled to recover the sum claimed in his petition and affidavit to be due to him.

If the statutes existing prior to the enactment of the Revised Statutes, the practice uniformly pursued to collect joint-debtor judgments, the evils arising under the construction given to prior acts, and by the Revisers avowedly designed to be remedied by the Revised Statutes by a section adopted in the very words in which they drew it, are considered, I think it will be obvious that they did not dream of changing the form of pre-existing remedies, but merely designed in an action on such a judgment to put the plaintiff as against the defendants not served or not appearing, to prove that the cause of action on which the judgment purports to have been recovered, had in fact existed against all; and when that fact was proved to make the judgment itself evidence, but not conclusive evidence, as against such defendants, that the sum recovered was justly due, and as against those served to leave the judgment like any other judgment against a party who had been served with process, absolutely conclusive of his obligation to pay the sum adjudged to be due to the plaintiff.

The act of 1788 (2 Laws of N. Y. Greenl. Edit. p. 111, § 23) and the act of 1813 (1 R. L. 521, § 13), are precisely the same in substance, and provide that "in case judgment shall pass for

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the plaintiff he shall have his judgment and execution against such of them as were brought into court, and against the other joint debtors named in the process 'in the same manner' as if they had all been taken and brought into court by virtue of such process, but it shall not be lawful to issue or execute any such execution against the body or against any lands or goods the sole property of any person not brought into court." 2 R. S. 377, § 1, 3 and 4, provide that "in such case, the judgment, if rendered in favor of the plaintiff, shall be against all the defendants 'in the same manner' as if all had been served with process" (§ 1). The execution must be in form against all the defendants, but must have endorsed on it the names of the defendants not served with the process by which the action was commenced (§ 3), and the endorsement must direct that the execution shall not be served on the person of any defendant whose name is so endorsed thereon, nor shall it be levied on the sole property of any such defendant, but it may be collected of the personal property owned by him as a partner with the other defendants taken, or with *any of them*.

So far the Revised Statutes and the acts of 1788 and 1813 are in substance and effect the same: each and all of them require from the beginning to the end the same form of proceedings as in a suit where all had been served. Executions are in form against all, and must be. And on such executions, if § 4, of 2 R. S. 377, is to receive a literal reading, the property of the one not served may be taken to pay a debt for which he was never liable as a partner with any other defendant in the suit. By this section if A. B. C. and D. sign a joint bond (never having been partners) to secure the payment of A.'s debt, and B. only is served with process, and judgment is recovered, the execution to be issued, if B. and C. only are partners, may be collected by taking the property owned by B. and C. as partners and selling it out and out, to pay the judgment, whereas on a judgment against B. alone for his own debt, such a thing could not be done.

Even now, in a suit against several on promises alleged to have been made by all as partners, and where only one is served, on proof of a partnership which would be good evidence of it as against the one served, but no evidence at all as against those

not served, as his admission of the fact, or default to plead to the declaration, a judgment can be recovered in form against all, and the execution may be levied on any goods owned by those not served, as a partner with the one served. (*Halliday v. McDougal*, 22 Wendell, 270 and 271.) The defendants not served have had no opportunity to show payment or invalidity of the alleged contract, and may be the only parties having any substantial interest in the partnership property and effects.

We have seen that the former statutes and prior acts, so far as the parts above cited bear on the point, provide for continuing the joint liability, in the same form against all as against either. What was at first in form as well as substance a contract by all, is converted by the peremptory requirement of the statute into a judgment in form against all. Neither the act of 1788, nor of 1813, declared whether a suit could be brought on the judgment against all, nor in an action on it against all, what should be its effect as evidence as against those not served with process, nor whether it should have any effect. In *Dando v. Doll & Tremper*, 2 J. R. 88 (in 1805), in an action on a joint debtor judgment, where the defendant not served in the original suit pleaded simply *nul tiel record*, the court held that the production of the record which was in form that of a judgment against all, and required by statute to be so, made out the issue and entitled the plaintiff to recover. *The Bank of Columbia v. Newcomb* (6 J. R. 98), was an action on such a judgment, and the defendant who was not served, pleaded that fact, and that he did not appear in the action. The Court held, "being a judgment regular in form, against both the defendants, an action of debt will lie upon it against both, and consequently the pleas are bad." This was decided in 1810.

Taylor & Truss v. Pettibone (16 J. R. 66), decided in 1819, adjudged that in an action on such a judgment, the judgment was *prima facie* evidence of a debt, as against the defendant not served.

In *Townsend v. Carman* (6 Cowen, 695), the court decided (in 1827), that "if an action can be sustained upon such a judgment, it must be against all." The "judgment is to be entered in the usual form, and so far as depends upon the act, it is to be followed by the usual consequences, with the restrictions

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particularly specified." The court further held, that the 2d of J. R. 87, 6 id. 98, and 16 of id. 66, distinctly passed upon and decided the point that an action of debt would lie on such a judgment, and also held that the judgment is *prima facie* evidence of a debt against the party not brought into court. *Carman v. Townsend*, was carried to the Court for the Correction of Errors, and decided in December, 1830. Only two opinions were delivered, and the judgment of the Supreme Court was unanimously affirmed. (6 Wend. 206.) The Chancellor said, "the plaintiff in error is unquestionably right in his first point, in supposing that the first judgment was an extinguishment or merger of the original indebtedness, so that no action could be sustained against either of the defendants on the original promises. If any action could be sustained against the defendant not arrested in the original suit, it must be in form an action of debt founded on the judgment." BEARDSLEY, SENATOR, said, "it is now objected by Carman, that an action of debt will not lie on such judgment. This is the only objection that has been urged on the argument which requires consideration: that such action will lie has been too long settled to be now called in question. It is right in principle that such action should be sustained; a contrary rule would work great injustice to creditors."

Such were the decisions upon the acts in relation to such judgments recovered prior to the time when the Revised Statutes took effect. The revision was had, and the Revised Statutes were enacted before the decision was made in *Carman v. Townsend* by the Court of Errors. The second section of the joint debtor act in force when these proceedings were commenced, declares that "Such judgment shall be conclusive evidence of the liability of the defendant who was served with process in the suit, or who appeared therein; but against every other defendant it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence." (2 R. S. 299, § 2.) Of the extent of what demand? and what is the liability to be established by other evidence?

What was the evil to be remedied, or doubt to be obviated, by this statutory provision? Was it to be effected by changing the

form of actions, or by altering a rule of evidence? Was it the object to coerce or even permit a plaintiff to sue, upon the original cause of action, either or both of the defendants against whom such a judgment had been recovered, or to declare that as to those not served, when sued on such a judgment, the plaintiff should be required to make all the proof that would have been required of him in a suit upon the original cause of action? Or did it intend to allow what had always been permitted,—an action on the judgment against all of the defendants, to permit the plaintiff to assert and insist that he had a demand on the judgment, but in order to sustain it and recover on it, require him to prove as against those not served what he must have proved as against them if they had appeared in the original suit; viz. that they jointly with the others made the promises or contracted the debt on which the judgment purports to be founded.

The original note of the Revisers to this section states that it was enacted as drawn by them, and reads thus: "The law on this subject seems rather unsettled, *vide* 16 J. R. 66; 6 Cowen, 697. The better opinion probably is, that the defendant not brought in, may contest the judgment, but this throws upon him a very onerous burden of proving a negative. The above section (§ 2) seems calculated to prevent fraudulent combinations, and to give to a plaintiff all he ought to require."

This note of the Revisers refers to decisions made in actions, brought on such judgments recovered under the prior acts. Those decisions held, that the only mode of proceeding against all the parties to the original contract was by action on the judgment, and that the judgment was *prima facie* evidence of a debt against those not served, or in other words, that the record itself was *prima facie* evidence of their liability upon it, being in effect as it was declared by it. They thought this was giving to it an effect unjust towards such defendants; they therefore proposed the section in question to abrogate this rule of evidence; not to deprive a plaintiff of his remedy by action on the judgment, but to compel him, in such action, to establish by other evidence than the record of the judgment, that

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those not served in the first suit, were joint parties to the contract, on which it was founded; and provided that when this was established, the judgment should be evidence of the extent of the plaintiff's demand upon it as against them, and as against the others *per se*, conclusive evidence of a liability upon it as declared by it.

This plaintiff, then, had a judgment against all. The statute declares it to be a judgment! It is in the form required by statute. It is in the precise form in which judgments in like cases have been required by statute, since Feb. 7, 1788, to be entered. From that day to the present all the courts of this state have held that an action will lie on such a judgment against all the parties, and no court has yet decided to the contrary. No judge or court has yet intimated a doubt that all the parties to the original contract are yet liable in a joint action of some form, and upon something. If liable in an action against all jointly, upon what can it be brought, if not upon the judgment? But one judge has ventured a reported opinion that they can be sued jointly on the original contract. In one of the printed opinions found in 4th Coms. 513, it is intimated that an action will lie on the contract against the party to it, who was served with process in the first suit, and against whom a judgment was rendered on the merits, which remains in full force and effect, in no way reversed or vacated. No one has intimated an opinion that the liabilities have been severed, and that some have become separately liable as judgment debtors and not otherwise, and others liable separately upon contract, and only upon contract. It is very certain that the statute has not declared that any such anomalous or absurd results shall be produced by the judgment authorized by it. It does not seem to be necessary to now give such a construction to it to preserve the original rights of either party intact, or to simplify forms, or promote justice. Such a construction will overturn every principle heretofore settled, deny every form of remedy heretofore pursued or allowed; and by applying it to suits which have been in progress for years, may defeat the most important interests, and work the most ruinous results without conferring the slightest benefit upon a single suitor in all time to come.

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Of the eight judges who sat in the court of appeals, two, viz. Judges Gardener and Gray, were for affirming the judgment of the court below: They, of course, not only held that an action would lie on the judgment, but also held what it seems to me every one must hold, who goes thus far, viz. that a party who has a judgment on which he can bring an action, in which he is able to recover the amount of such judgment, has a "demand arising upon judgment," no matter what evidence must be given to establish the liability of the parties sued or the extent of such demand: Judge Jewett, who voted to reverse, held that an action would lie against both Young and Baker on the judgment: Judge Paige also voted for a reversal, but wrote no opinion. A letter of his, in 1851, in reply to one from the plaintiff's attorney, says thus: "The judgment confessed by Young was not, in my opinion, evidence of a demand against Baker personally; although I agreed with Judge Jewett, that as the forms of procedure against the two was a mere question of practice and pleading, the action of debt might be brought against both on the judgment, to prevent the embarrassment of declaring against the one in debt, and the other in covenant or assumpsit."

Hence there is evidence that four of the eight judges held that an action would lie on the judgment. It cannot be said, then, that the court of appeals has decided that such an action will not lie. Judge Ruggles is reported as having voted for a reversal. He gave no opinion. His letter of November 26, 1851, to the same attorney, concludes thus: "But if the result had depended on my vote, I should have wanted further time for consideration and reflection before I would have voted for a new trial. The ground, on which I thought the decision should have been placed, was this:—that the second section of the joint debtor act, so far as it makes the joint judgment evidence against the defendant not served with process, is in conflict with that part of sec. 6 of art. 1 of the constitution which declares that no person shall be deprived of his property without due process of law."

All this shows that five of the eight judges did not assent to the proposition that no action will lie on such a judgment. It cannot be said, then, that any such principle has been decided

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or was settled. Yet the judgment was reversed. The court to which the cause was remanded cannot dispose of it intelligently without ascertaining what principle, if any, was settled by the Court of Appeals. The *remittitur* gives no information on the point. It simply reverses the judgment appealed from, and orders a new trial. It contains no resolution of or instruction from the appellate court. No allusion would have been here made to the letters above referred to, were it not for the consideration that they furnish the only evidence known to exist of the opinions held by those writing them, on the points to which the extracts relate, at the time the judgment of reversal was rendered. As it was not deemed inappropriate to furnish such evidence of those opinions, I hardly need add, that it cannot possibly be deemed discourteous to refer to such evidence, when it becomes necessary in order to a proper determination by a subordinate tribunal, of the same cause, to ascertain, if possible, what precise questions were deliberately considered and settled by the court above.

The only inference fairly deducible from the reported opinions, is, that five members of the court, viz. Judges Bronson, Jewett, Mullett, Paige, and M'Coun, were of opinion that the plaintiff in this action did not show that he had a demand against both Young and Baker, arising upon a judgment. If this is a just inference it is equally obvious, that two of the five, viz. Judges Bronson and Mullett, so held for the reason that they held that no action would lie against Baker on the judgment. That Judges Jewett and Paige, while dissenting from the latter proposition, so held, notwithstanding their opinion that an action would lie upon it. If Judges Bronson and Mullett would not so have held, had they agreed with Judges Jewett and Paige that such an action would lie, then it follows that the four concurred in a vote to reverse, and that the former two, as well as the latter two, did so for reasons which the other two repudiated. On whichever ground the opinion of Judge M'Coun was given, it makes at most a concurrence of but three votes upon any one specific proposition, and the reversal by the appellate court did not settle a principle.

Judge Mullett, after ably and at length examining the previous and existing acts, and reasoning to the conclusion that

the judgment was no evidence of a debt as against Baker, adds: "It is admitted that this course of reasoning tends to the conclusion, that an action of debt cannot be maintained on a judgment recovered under the statute relating to proceedings against joint debtors, against a party who was not served with process, and did not appear in the action in which such judgment was rendered." * * * "If an action of debt on judgment cannot be sustained by the undisputed record of the judgment, what will sustain it?" "It devolves on those who hold that an action will lie against the party who did not appear in the suit in which it was rendered, to show how it can be sustained, and what proof will sustain it. Until these questions are satisfactorily answered, I shall agree with Ch. J. Bronson on this point also." Before stating what with deference I regard as a fair and true answer, it is to be observed that Judge Mullett does not assent to the apparent inconsistency of saying that a party may sue upon a contract, and recover, without having a demand arising upon contract, or may sue upon a judgment and recover, without having a demand arising upon a judgment. His opinion obviously is, that any party who as a matter of right can sue and recover on a judgment has a demand arising upon judgment, and he therefore held that in this case the plaintiff had no demand against Baker arising upon a judgment, because he was of opinion that an action on this judgment would not lie against him. And why, in his opinion, would not an action lie on such a judgment? Obviously for the reason that the record is no evidence as against Baker of a debt or of his liability. He asks "what will sustain" the action on the judgment if the record will not? and observes that the duty of those who claim one will be "to show how it can be sustained, and what proof will sustain it." It is answered that on just such a judgment, obtained in just such a proceeding, and in the precise form of this, it has been decided in every reported case prior to this from the passage of the first act in 1788, that such an action will lie. The court of last resort unanimously so decided in *Carman v. Townsend*. But those cases held more. They also held that the judgment record itself furnished sufficient evidence to sustain the action. The second section of the Revised Statutes did not declare that

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no such action should afterwards be brought; but it provided what should be proved in such an action to sustain it as against the party not served. That section answers the question put by the learned judge, "What proof will sustain it?" The answer is, "Establish the liability of the defendant not served by other evidence than the record itself, and the plaintiff shall be allowed to recover. And when he has given sufficient evidence to establish the liability, the record shall be evidence of the extent of his demand."

The Legislature have never been embarrassed to find words capable of expressing clearly their intention to provide that a contract might be extinguished as to one joint contractor, and yet that an action might be brought on it against the other, when they designed to do so. This was expressly enacted in the act for the relief of partners and joint debtors (Session Laws of 1848, p. 243, § 3). The amendment in 1845 (p. 410, § 2) provided for discharging a judgment of record as to such of the debtors as had compromised according to the provisions of the act of 1848.

The proceedings are simple, and the remedies to be taken and proof to be given are obvious, if no change of the pre-existing well settled law is to be deemed to have been made, except such as the second section of the act (2 R. S. 299) enacts. The judgment-record contains a declaration which sets forth a contract made by all the parties jointly, a breach of it, and the judgment of the law that the plaintiff recover against all the defendants a specified sum by reason thereof, and shows that Baker, one of the defendants, did not appear. In an action on such judgment, the plaintiff produces his record, which proves that he has a judgment in form against all, as he has averred in his second suit. It establishes conclusively the liability of Young; as against Baker he must go further, and prove by other evidence the making of the contract by all, which is described in the record. When he has done this, he has established, as the statute prescribes, the liability of Baker, and his right to recover against both. Whether he must in the first instance give other evidence than the record of the extent of his demand, I will not stop to discuss. Ch. J. Bronson held that "the whole extent to which the recovery can go must be

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established by extrinsic evidence" (p. 521). The statute says, the judgment as to the party not served "shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence." His idea is, that even if the fact of actual liability is established by other evidence, the record is not *prima facie* evidence that such defendant is liable to the amount of the judgment; that it cannot be used at all as any evidence tending to show that so much is in fact due, but that it merely operates as an estoppel to absolutely prevent the plaintiff from recovering more, even though he should conclusively prove that more is due. If this is what the Revisers meant by their note upon this section, when they said of it that it "seems calculated to give to a plaintiff all he ought to require," a plaintiff will find it difficult, in the happiest experience of the benefits conferred, to be penetrated with a very devout thankfulness to the givers of such imperfect gifts. But for such a construction, if left free to sue on the original contract the one not served, and if as between the two there is no judgment, and each party is to be treated as being *in statu quo*, natural equity and common justice would seem to require that he should be permitted to recover all that he can prove to be due. But assuming the Ch. J. to be right in his construction of this clause, it is of no moment in this case, as the plaintiff on this trial offered other proof fully satisfying this rule.

Of the very elaborate and able opinion of the Ch. J. it may justly be said, that if his premises are conceded to be well taken, that no action will lie on the judgment, his conclusion is a logical one; that the plaintiff did not have a demand arising upon judgment.

The error of his opinion, as I think, is in his premises. He observes that "it is absurd to say that a party may have an action on a judgment which is no evidence of the defendant's liability. He might as well sue on a piece of blank paper." I think in this he is mistaken. It may be granted that it is absurd to say that a party may have an action on a judgment which is no evidence of the defendant's liability, yet if the Legislature see fit to provide, or the court of last resort to hold, that an action will lie on such a judgment, the plaintiff in such

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an action would have very decided advantages over one suing on a piece of blank paper. Not that the record alone or of itself, without anything else, would serve him more effectually than the blank paper. But, in the one case, it is respectfully and confidently suggested that he may do what the statute says he may; prove by extrinsic evidence, the liability spread out on the face of the declaration embodied in the record, and the extent of such liability, and have a recovery for the amount of the judgment and interest, while in the other supposed case no principle of law, no statutory provision, nor long established practice, exists, enabling him to commence or sustain an action.

If it be an absurdity, it is a legislative one, and in an age which vehemently complains of the existence of such absurdities, without number, it should not be made a bar to the administration of substantial justice. If an absurdity, it has one redeeming merit! To act upon it can by no possibility work injustice to a defendant. It deprives him of no defence, exonerates the plaintiff in no respect from the necessity of giving evidence either in kind or quality which would otherwise be required of him, and in no way diminishes a defendant's chances of extinguishing his debts by the meritorious plea of the statute of limitations. (*Bruen v. Bokee*, 4 Denio, 56.)

Such being the effect of the law, I cannot understand the applicability to it of the remarks of the Ch. J., that "that State must not boast of its civilization, nor of its progress in civil liberty, where the Legislature has power to provide that a man may be condemned unheard."

Surely the whole head and front of legislative offending hath this in it and no more. It requires a party having a claim against debtors which he would prosecute to judgment when some are beyond the reach of the process of the court, to name all as defendants in the process; and when some have been served, to declare and state truly his alleged cause of action against all. If he establishes this, it gives him a judgment against all, and preserves the continuance of their joint liability by giving him a right to bring an action against all on the judgment. In such action, as against those who did not have a chance to be heard in the original suit, it requires him to make precisely the same proof of their liability upon the cause of action described in

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the record, as he must have made if he had sued on that cause of action alone, and allows to the defendant every defence he could have made in such action. If he establishes such liability he recovers, otherwise not. What ground of complaint has such a defendant? How is he prejudiced by such legislation? Is there anything in such an act which appeals to "the judiciary to decide how much respect shall be paid to an edict so revolting and tyrannical?" (Mullett, J., P. 536, 4 Coms.)

One consideration of much force, as it seems to me, presents itself, in contemplating this act as it was up to the 1st of January, 1830, the decisions under it, and the act as it was amended when it went into operation on that day. If the Legislature intended by § 2 of 2 R. S. P. 299, to abolish the remedy by action on the judgment, and compel a plaintiff to sue those not served, on the original cause of action, notwithstanding the judgment against those served, it would have been as natural, as easy to have said so, and to have provided that he might do so, and that in case a judgment was obtained and the money collected, such defendant should have all the rights to compel contribution by his co-contractors, which belonged to him, according to the nature of the original transaction between them. This the Legislature did not do. If the second section had read, "such judgment, in an action upon it, shall be conclusive evidence of the liability of the defendant who was personally served with process in the suit, or who appeared therein, but against every other defendant, it shall be evidence only of the extent of the plaintiff's demand after the liability of such defendant shall have been established by other evidence," it might be said to be an absurdity, or an anomaly; but it would have been one promotive of justice by the equity of its provisions, by the simplicity of the remedy, which was understood by all, and had been pursued for half a century, and yet would have declared nothing different from the understanding of the profession of it, down to the time when its true meaning and proper effect were thrown in doubt by the dissenting opinion in *Mervin & Goldsmith v. Kumbel*. The whole effect of the statute, is to transform, so far as the form of the remedy is concerned, the original indebtedness on contract, into an apparent

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liability upon a judgment, possessing in effect as to the defendant not served or not appearing, no one quality not belonging to the original indebtedness, and as to those served or appearing, every quality belonging to any judgment rendered against them by a court of competent jurisdiction after a litigation upon the merits. The whole effect was and is to preserve the joint liability of all the defendants, if such a liability in fact existed, and to allow its existence to be litigated and determined in a form of action appropriate to the apparent change in the position of the parties; viz. in an action of debt on the judgment.

On no fair principle of construction can it be said that the Legislature intended, by the act of 1830, to abolish the remedy by action on the judgment. From 1788 to 1830, the laws in force provided for entering judgments in the same form as they are required to be entered under the act of 1830. One species of apparent injustice resulted from the constructions given to the prior acts. It was not that an action on the judgment was sustained, or that the defendant not served was compelled to pay a just debt. But it was that in an action on the judgment, recovered without his having an opportunity to be heard, the record was held to be *prima facie* evidence of his liability. That at least was the injustice pointed out by the Revisers, by a reference to the decisions that had been made. They proposed a section for the avowed purpose of obviating this one evil. The Legislature enacted it as drawn by the Revisers. That section said that such record should not be any evidence of liability, but that the plaintiff himself should establish it by other evidence. When establish it, or in what cases? In an action on the original contract? That he would be required to do if no statute existed, and no one is reported to have brought an action on the contract after having recovered such a judgment. It does not seem that such an action could have been contemplated by the Legislature. If not in an action on the contract, then in an action on what? Obviously, as it seems to me, in an action on the judgment, a remedy then, and the only one then known—one adapted and appropriate to the form in which the apparent liability appeared, and an action, which, as a member of the court of last resort remarked, in *Carman v.*

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Townsend, had been so long allowed and sustained, that the right to maintain it could not then be called in question.

With such considerations in favor of the right to maintain the action—with a thorough conviction that the Legislature intended to preserve that right, with the expressed opinion of four judges of the Court of Appeals that the action will lie, and of that of a fifth that the reversal should be placed on some other ground than that one will not lie, or that the plaintiff did not show a demand arising upon a judgment, it seems to me that this court is not only bound to decide that it will lie, but that it can find no justification in deciding to the contrary.

Do the reported opinions and other evidence alluded to of what actually was decided, satisfactorily show that the court decided that the plaintiff had no demand arising on a judgment, irrespective of the question whether an action would or would not lie, or conceding that one would lie on the judgment? If they do show this with reasonable certainty, then it is the obvious duty of this court to consider that an established principle, and apply it to this case as it is now presented.

I can find nothing in the opinion of Judges Bronson and Mullett to justify the conclusion that they held or intended to decide that a party cannot be said to have a demand arising upon a judgment, if he can maintain an action upon it in which he can recover the amount of the judgment. On the contrary, their arguments tend to show it to be their judgment that such an opinion would be erroneous. If this be so, then the case stands thus: Two hold that the grounds on which three voted to reverse are erroneous, and the latter that the judgment of the other two was based on a principle which is contrary to law. It seems to be quite apparent that the judgment was reversed without settling a principle, and that it is the duty of the subordinate court in such a case to decide according to its clear conviction of what the law is, after a mature consideration of the opinions given on the reversal, as well as of other adjudications upon the question to be decided.

It has always been considered that a decision made under such circumstances furnishes no guide for the re-trial of a cause or the judgment to be rendered after such re-trial, beyond the fact that for some reason or other the former judgment of the

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subordinate court was reversed. (*Bronson, Ch. 2 Denio, p. 29; Supervisors of Onondaga v. Briggs, and Vance v. Phillips, 6 Hill, 437; Vide Butler v. Van Wyck, 1 Hill, 462.*)

It is quite obvious that Judges Bronson and Mullett held no action would lie against Baker on the judgment, and that Judges Jewett and Paige held that the plaintiff had no demand against him arising upon the judgment, for the common and sole reason that the judgment itself was no evidence of Baker's liability.

CH. J. BRONSON says, p. 519: "It is absurd to say that a party may have an action on a judgment which is no evidence of the defendant's liability."

JUDGE MULLETT inquires, p. 535: "If an action of debt on judgment cannot be sustained by the undisputed record of the judgment, what will sustain it?"

JUDGE JEWETT says, p. 541: "The plaintiff's demand then, in fact as well as in law, arose as against Young upon the judgment, and is conclusive evidence as against him of his liability as adjudicated."—As against him (p. 540), "by the judgment a new debt is created, and the old demand is thereby merged." "As against Baker it arose upon the original contract, as the judgment is not any evidence against him of his liability to the plaintiff."

JUDGE PAIGE says: "The judgment confessed by Young was not, in my opinion, evidence of a demand against Baker personally."

That the judgment was no evidence of Baker's liability to the plaintiff cannot be doubted, for the reason that the statute declares it shall not be. But why may not a plaintiff be fairly and justly said to have a demand against another arising on judgment, notwithstanding this, if he has a judgment authorized and denominated such by statute, the amount of which is justly owing to him by all the parties against whom it is rendered, and if by law he may sue on such judgment, and by law give evidence which will establish the liability of all to pay it by reason of the matters alleged in it? Is the distinction taken by those who hold that in such a case he has no demand arising on judgment, one of substance calculated to promote the ends of justice, and preserve substantial rights, or is it one of form,

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of no practical benefit to any person, unadapted to preserve even the frailest equity in any possible contingency, and one by an austere adherence to which the most important interests and rights of suitors may be sacrificed to the subtilties of philological polemics.

The interpretation given to the words "arising upon," by those who deny in such a case the existence of a demand arising upon judgment is, that they mean the same as the expressions "originating or proceeding from" the judgment, and that only, and that no other meaning more favorable to the plaintiff can fairly be given to them. With the most respectful deference I submit that this is hypercritical, and should be admitted to be so by every one who holds that an action will lie, and a recovery may be had upon such a judgment upon giving certain evidence prescribed by the statute which authorized the judgment. One of the definitions of "arising" is "appearing," and one of the definitions of the verb "arise" is "to appear or become known, to become visible, sensible, or operative." (Web. Unab. Dic. 68.)

The plaintiff had a judgment against both, which set forth promises made to him by both jointly, the non-payment of the sums promised, and that they amounted to the sum for which the judgment is rendered. The judgment is conclusive evidence against Young, that the facts alleged are true, and that he is liable by reason thereof and of the recovery to the amount of the judgment. In point of fact Baker is also liable, irrespective of the recovery, to the same amount, by reason of and upon the liability described in the record. The plaintiff has a just claim or demand against both, upon and by reason of the alleged facts, appearing, or made known or visible upon the record. Is not the plaintiff's demand one "appearing" upon, visible upon, or which becomes known upon the record of the judgment? It does not originate from or upon the judgment. But it appears upon it as against all, and may be collected by action upon it against all! It is only in a technical sense that it can be said to originate upon the judgment even as against Young. The foundation of his liability is contract, and the judgment adjudicates that he made the contract, and is liable by reason of it, and for a breach of it, to the amount of the judgment.

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The judgment is conclusive evidence of his liability upon the contract appearing on the record to the amount of the judgment, and precludes him from again controverting it. The nature and extent of the demand made against Baker appear upon the record as fully and particularly as of the demand against Young. As to the one, liability is to be proved; the record is not the proof of it, nor does it show what the proof will be. But it shows it as fully as a suit on the original cause of action would. For the declaration in such a suit would be the declaration contained in the judgment record. As against Young, no proof of liability is wanted. For as to him, the record on which the plaintiff's demand appears is conclusive evidence of his liability, not merely of a liability to pay the amount of the judgment, but by reason of his being a party to the contract or contracts appearing upon the record. A severe criticism, and austere verbal refinement are justifiable when adopted to prevent a failure of justice, or to shield a party from manifest injustice. But when important interests depend upon the definition to be judicially given of the words "arising upon," and that too in a case where a plaintiff has once established, and again offers to establish, a just right to be paid by the defendants the amount claimed, and whether he is to fail in collecting his debt, if the words are held to mean "originating upon," or proved by, and is to succeed, if they may fairly be held to mean "appearing upon," or shown or disclosed by, though to be proved and sustained otherwise than by the record of a judgment which describes it, I think that a court which is to be the final arbiter in such a case, should pause long, and deliberate solemnly, before they adopt the one to the manifest defeat of justice, rather than the other, which can work no possible injustice to either, and maintains the just demands of the plaintiff, and secures the payment of them. If a plaintiff's rights are to be lost and defeated by such critical refinements, he may appropriately and reproachfully exclaim, "on what a slender thread hang all human things," and point to the record of this cause, not as any evidence of his demand, but as conclusive evidence of the inglorious uncertainty of the law.

When I speak of the justice of the plaintiff's demand, I of

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course only speak of it, as it appears from the papers on which the pending appeal has been heard ; what would have appeared if the evidence offered had not been excluded, I neither know, nor pretend to conjecture, but the court is bound to assume, for the purposes of this decision, that the facts are as he offered to prove they were, and that he could have established Baker's liability to the full amount of the judgment rendered against him and Young. If the application for the attachment and affidavit verifying it, had stated that "the plaintiff had a demand against Young and Baker for \$22,492⁰⁰/₁₀₀ against them as defendants, in favor of the plaintiff on a judgment rendered in the Supreme Court of this state, on a contract made by them jointly, in an action in which only Young was served or appeared," would any one doubt that the nature of the demand was described with sufficient accuracy, fulness, and precision to justify the issuing of an attachment? If urged that it is commonly stated to be a demand "arising on judgment," the court would answer, that shall not defeat the proceedings, because the nature of the demand is truly set out, and we can see that it is one which authorizes the issuing of an attachment. The statute does not require a party to name his demand either in his application or affidavit, and if he does, and erroneously, that shall not vitiate his proceedings so long as he states his demand truly, and one which will sustain it.

How much less did the plaintiff state in the application which he made? He said he "had a judgment recovered by him as a plaintiff, against Young and Baker as defendants, in the Supreme Court of this state, for the sum of \$22,492⁰⁰/₁₀₀. That that amount was due to him over and above all discounts, and he had a demand against the two, of that sum arising on this judgment." He did not set out the judgment, nor state whether it was one recovered in an action on *tort*, or upon contract, or whether one only, or both were served with process. That was apparent on the face of the judgment referred to. It had been the statute law of this state ever since 1788, that a creditor might have a judgment against two on a contract made by them jointly, whether both or only one of them was served with process. Baker knew (assuming the facts offered to be proved as true) that he and Young were indebted as

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partners to the plaintiff in the sum named, and that he was liable to have his property attached, even though a judgment had been recovered against both on a service upon Young only. The application stated the judgment, and referred to it as showing what his demand was. It truly showed the nature and extent of it. Is not this statement enough to satisfy all the requirements of the statute as to the contents of the application? By inspection of the judgment referred to in the application, and by such reference in a certain sense incorporated in it, the court sees the precise nature of the demand set out; that it is one which authorizes the issuing of an attachment, that the record settles incontestably the liability of Young, and knows that to establish the demand as against Baker, all the plaintiff has to do is to prove his liability, and if you please the extent of it. Is it of any consequence whether the application gives a name to the demand or not, or misnames it, when it gives enough of detail to show that it is one which authorizes an attachment? When a point is to be strained, or a long series of adjudications departed from, to secure a result, it should be one imperatively demanded by high considerations of justice, or indispensable to avert from a party a palpable and serious injury. On the merits as determined by the first trial, and as offered to be established on the last, which of these results is produced by the rigid construction and verbal criticism invoked in this cause in behalf of the defendants?

On the facts offered to be proved by the plaintiff, I think he is entitled to recover the amount claimed: the merits of the case commend it to the favorable consideration of the court: Baker and Young justly owe him the amount claimed: it is a claim on which, and they are persons against whom, an attachment might rightfully be issued: one was issued in conformity with the provisions of the statute, and their property was seized by it by a proper officer: they procured the attachment to be discharged, and obtained a restoration of their property by procuring sureties to give a bond in which they agree to pay whatever the plaintiff in a suit to be brought on it against them could prove to be due on this claim. He brings a suit against them on this bond, and offers to prove his claim and the amount due him. The sureties object, and say to the plaintiff, your application for

the attachment stated that you had a demand against Young and Baker "arising upon a certain judgment." The defendant produces a judgment. He is told that it is no judgment as against Baker. He reads it; in terms it is against both, it is in the precise form of all judgments against two defendants, it is in the precise form authorized and required by statute, and the statute declares that it is a "judgment" against both! It is a judgment then, and properly so called. A party may surely be permitted to speak of it by the name given to it by a statute, of the state of which he is a citizen, and in the courts of which his suit is pending. The defendants then object that though the plaintiff has a judgment against both, he has no demand "arising upon" it, as against Baker; he has one arising upon it as against Young, and against him only. It is conceded then that the description is half true; there is no denying that the plaintiff under any construction has a demand arising upon it as against Young, and why not as against Baker? It is answered that no action will lie on it against Baker. It is a sufficient reply to this to say, that it has uniformly been held since the first act was passed in 1788, that an action will lie on a judgment recovered under precisely similar circumstances, and in precisely the same form as this—that has become the settled law of this state. It is again objected that those decisions were made because the judgments recovered under the law as it existed prior to 1830, under the construction of such prior law, were held to be *prima facie* evidence of a debt as against the party not served, but by the amendment made in 1830, they are no evidence of the liability of such party. It is a sufficient reply to this to say, that the same act does not in terms deprive a party of the remedy by action theretofore allowed as the only appropriate remedy, but by every fair implication and reasonable intendment preserves it. The amendment made requiring the plaintiff, instead of using the judgment as evidence of the liability of such party, to establish it wholly by other evidence, in effect provides that he may do so, and that on doing so he shall recover. At most but three judges of the court of appeals have expressed a contrary opinion, four have expressed their deliberate opinion that such is the existing law, and the fifth has expressed no

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dissent to the opinion of the four. It is again objected that though an action of debt will lie and a recovery may be had against both on the judgment, yet as against Baker, the plaintiff must prove that he and Young were liable as joint contractors, in manner and form as such liability is set forth in the judgment record. And inasmuch as the plaintiff must prove this, his demand as against Baker arises on contract and not upon the judgment.

Two of those who voted to reverse do not express an opinion that a plaintiff has not a demand arising upon a judgment, upon which he can maintain an action against both, and recover from all the parties to it, the whole amount of it. Other two of them express the opinion that he has.

A more careful examination of the act under which the attachment was issued, will satisfy any one, as I think, that in cases arising under it, the rules in relation to variances in suits at common law have no application; that the statute is satisfied by such a statement of the demand, as shows that it arises *ex contractu* and not *ex delicto*, and by such a general description of it as will fairly apprise the debtor for what the attachment was issued.

All that the statute specifically requires to be stated in the application is, "the sum in which the debtor is indebted over and above all discounts, to the person in whose behalf such application is made, and the grounds upon which the application is founded." (2 R. S. P. 3, § 4.)

"The facts and circumstances to establish the grounds on which such application is made, shall also be verified by the affidavits of two disinterested witnesses." (Id. § 5.)

By the construction uniformly given to this statute, it has been held sufficient that the affidavit of the witnesses shows merely the non-residence of the debtor, when he is proceeded against on that ground, and that it need not prove the existence of the debt, or anything in relation to it, nor the residence of the creditor. Neither need it be stated either in the application or affidavit where the contract was made, when the application states, as it did in this case, that the applicant resides within this state and the debtors out of it, and that the attachment is sought on the ground of such non-residence. (*Staples*

v. *Fairchild*, 3 Coms. 41-42. *In the matter of Brown*, 21 Wend. 316.)

It has been usual, and deemed sufficient to satisfy the requirements of the statute, to simply state that the defendant was indebted in a sum named, over and above all discounts, "upon contract," without stating the terms or even the nature of the contract. All the reported cases furnish evidence that this is so, and it does not appear from the report of any case, that the jurisdiction of the officer granting an attachment, or its validity, has been assailed on that ground.

No more in that respect appears to have been stated in the application in *Staples v. Fairchild* (4 Coms. 44), or in *the matter of Brown* (21 Wend. 316.)

Is it necessary to state more in the application than that the applicant has a demand against the debtor, that it arises *ex contractu*, and not *ex delicto*? Is it necessary to otherwise state the nature of the indebtedness, than to state enough to show affirmatively that it arises *ex contractu*? Sections 8 and 4 were not supposed or designed by the revisors to be a change of the previously existing statute in that respect. (3 R. S. P. 613, § 3 Rev. Notes.) Section three of 2 R. S. P. 3, is in no respect different from § 1 of 1 R. S. p. 157, except that the latter required the applicant to simply state that the person proceeded against was "indebted to him" in a sum to be named, and except also that 2 R. S. declares that a person may apply who has a demand arising on contract, or upon a judgment or decree rendered within this state. These words, as the notes of the Revisers suggest, are merely declaratory of the law, as it was construed and applied in 3 Caines R. 323, *Lenox et al. v. Howland et al.* In the latter case (decided in 1805) the court held that an attachment would lie whenever the liability originated in contract, notwithstanding that particular damages sought to be recovered, might have resulted from negligence in the execution of the contract, and that in an action against the debtor it might be necessary to declare for a misfeasance or nonfeasance. The court said, "the law is remedial, and should be construed to embrace as many causes of action as possible." I will not pause here to inquire why then may not a party properly say he has a demand arising upon judg-

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ment, when he has a judgment on which he can bring an action and recover in it the amount of the judgment?

It was the design of the act "to place the property of a debtor in trustees for the payment, not solely of debts in the legal acceptation of that term, but of every demand contracted against his estate, as well those due to the attaching party, as to others, and in like manner to give the trustees a remedy as broad against third persons. If we once begin to refine and make nice distinctions on this subject, no one can say where we shall land. The act will soon be repealed, or become a dead letter." (S. C.)

The spirit and doctrine of this decision are, that the act is remedial, and is to be liberally construed to aid a party, having a demand against a debtor, to collect it. That the word "demand," the one word in § 3 of the R. S. is not synonymous with debt in the legal acceptation of that term. That the act should be so construed as to embrace as many cases as possible.

I am not aware that subsequent cases have repudiated or questioned the doctrines or spirit of the decision made, or the views expressed in *Lenox v. Howland*. If the considerations urged in that case ought justly to influence in deciding this, then it would seem to be not only proper, but a duty, to so interpret the phrase a "demand arising upon judgment," as to embrace every case of a "judgment" known to the law as such and by that name, on which a party can bring an action, which is defined to be a "legal demand of one's right," and make a just claim upon it, or through it, or by reason of the matters alleged in it, appearing from it, or disclosed by it, no matter by what evidence the justice of the claim, or the fact of the indebtedness or the extent of it is to be established. Especially should such an interpretation be given in behalf of a plaintiff in a judgment, which the law coerced him to take in the precise form in which he did take it, under the penalty of forfeiting all claim against the debtor not served, if a judgment should be perfected against those only who were served. If it be borne in mind, that the only persons against whom sections 1 and 2 authorize an attachment to be issued, are therein described and declared to be "persons indebted on contract;" it will be

obvious that the word "contract" is there used in its most comprehensive sense, and includes within it a *judgment*. If it is not required to state more respecting the nature of the demand than may be necessary to show that it does not arise *ex delicto*, but does arise *ex contractu*, then, if in this case it had been alleged to be a demand arising *ex contractu*, without any further specification concerning it, and the plaintiff in a suit on the bond given to discharge the attachment had declared upon a judgment rendered upon personal service of process against all the parties defendants, would he have necessarily failed to recover on account of variance? A judgment is a contract, within the most comprehensive meaning of the latter word. The word contract, as used in sections 1, 2, and 3, of 2 R. P. 3, was obviously designed to comprehend and include the word judgment. To the objection, your application alleges that you have a demand arising on contract, and in your declaration you set up one arising on judgment, and this is a fatal variance, he might answer; a judgment is a contract within the meaning of this act. The act only requires me to swear to a sum due, over and above all just deductions, and that the demand originated in contract, no matter that the sum demanded may be claimed for misfeasance or nonfeasance, no matter what evidence must be given to establish my claim, and I am not obliged to state whether the contract was verbal or written, sealed or unsealed, or is disclosed by the record of a judgment which is *per se* conclusive evidence of your liability according to the form of the recovery, or is only evidence of the extent of my claim, after I have established by other evidence your liability upon the contract set out in the record.

According to the views of one eminent judge, of the position and rights of a plaintiff who has recovered a judgment under the joint debtor act, the most appropriate description which he could give of his demand would be that "it arose upon a judgment" as to one, and "on contract," as to the other. *Jewett J.* p. 54. Every judicial officer except one who has been obliged to express an opinion upon this act, has declared that as to the debtor served, the original cause of action was extinguished, and as to him, his liability is one arising "upon the judgment," and upon that exclusively. *Brenson Ch. J.* 4 Coms. 520. The

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doctrine that the one is indebted on judgment, and the other on contract only, necessarily severs all joint liability of the debtors, and makes their liabilities several. One is liable on a judgment, and cannot controvert his liability; he can only show that it has been discharged subsequent to the rendition of the judgment; the other is liable only on a contract, which must be proved. If the two are sued jointly on the original contract, the one served may plead the judgment in bar. The other, if sued alone, may set up and prove a recovery against his co-debtor, as a bar to a suit against himself. That it would be a flat bar, if the first suit had been only against the one served, no one will deny. It must be so still unless, in case of a judgment against joint debtors, there is some provision of the statute which authorizes a separate suit on the original contract against the debtor not served with process, if it be law that the judgment extinguishes all liability upon the original contract of the debtor served.

Ch. J. Bronson, however, solves the difficulty, not by allowing some form of remedy sanctioned by the courts through a series of years; not by invoking and making a new application of a principle just in itself, or conceded to be so; not by giving effect to any avowed purpose of the Revisers, or any supposed intention of the Legislature; not by construing the act to remedy any mischief incident to the former statute, or to obviate any complaint made against it or judicial construction put upon it, —but by the novel and bold proposition that “the joint debtor act creates an anomaly in the law; and for the purpose of giving effect to the statute, and at the same time preserving the rights of all parties, the plaintiff must be allowed to sue on the original demand. There is no difficulty in pursuing such a course: it will work no injury to any one, and it will avoid the absurdity of allowing a party to sue on a pretended cause of action, which is in truth no cause of action at all, and then to recover on proof of a different demand.”

It seems to me a perfect and respectful answer to this to say: The joint debtor act does indeed create an anomaly in the law, as in case of persons jointly indebted it allows a judgment against all, when process has been served only on some of them. But it allows no injustice or inconvenience to either party in

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consequence of it. It does not sever the joint liability of the debtors, nor leave a plaintiff in doubt what remedy he is to pursue to collect it of those not served with process. It allows an action upon the judgment against all. It continues a practice, so far as it relates to the form of the remedy, which has been known to suitors and to the profession since the earliest period that an action of debt on judgment was first brought. In such action, the plaintiff is required to prove as against the one not served all that he would have been required to prove in an action on the original contract. As against the parties served no proof is required beyond the judgment-record. There is no difficulty in pursuing such a course, for the practice has been sanctioned by the courts for over half a century. It can work no injury to any one. It will avoid the absurdity of allowing a party to be sued on a pretended cause of action, which has been extinguished by a previous suit and recovery, which in truth as to him does not exist, and is no cause of action at all; and then to allow a recovery against him, notwithstanding express proof on his part that all liability upon the demand on which he is sued has been absolutely extinguished. It will also avoid the absurdity of overturning a long-established and well-settled practice, which violates no principle and prejudices no right, by substituting for it an additional anomaly, which violates a principle settled so long that the memory of man runneth not to the contrary,—that a judgment against a party served with process extinguishes all liability upon the contract on which it was recovered. It will also avoid the absurdity of holding that two persons may be sued jointly and held jointly liable in action on contract, when one is liable only upon a judgment, and not upon the contract, and the other is liable on the contract only.

No one will pretend that a single attachment can be issued against two jointly, when one is indebted exclusively upon a judgment against him alone, and the other is exclusively indebted upon a contract and upon that only. To authorize an attachment against two, there must be a contract made by the two jointly, or a judgment against both. In this case there is a judgment against Young and Baker on a contract alleged in the record to have been made by them jointly. Unless the

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court is bound by imperative considerations of duty, in order to aid a party to escape the payment of a very large demand, obviously unjust, it should not overturn a practice long established, nor turn a plaintiff out of court on the ground that he has no demand against Young and Baker arising upon judgment, when he has in fact a judgment against the two, which is conclusive evidence of his right to demand payment of it from Young, and offers to prove, as the statute declares he may do, the liability of Baker to also pay the full amount of it.

The legislative interpretation and understanding of the joint-debtor act of 1830, as evidenced by subsequent acts, supports and proceeds on the idea that an action would lie on the judgment, and that the party not served, on proof of his original liability, would be as much bound by the judgment, as the party served with process in the suit in which it was rendered. The code of procedure, as first enacted, provided that in an action against several persons jointly indebted upon a contract, the plaintiff "may proceed against the defendant served, in the same manner as at present, and with the like effect, unless the court shall otherwise direct." (Laws of 1848, p. 520, § 115, sub. 1.) That when such a judgment shall be recovered, those who were not originally summoned to answer the complaint, "may be summoned to show cause, why they should not be bound by the judgment in the same manner as if they had been originally summoned." (Id. § 328.) The summons "shall describe the judgment," and require the defendant to show cause in twenty days, and shall be accompanied by an affidavit that "the judgment had not been paid" and shall specify the amount due thereon. (Id. § 330, 331.) The party summoned may by answer "deny the judgment, set up any defence arising subsequently, and he may also make the same defence which he might have originally made to the action (except the statute of limitations). (Id. § 333.) The words in parentheses were not a part of the Code of 1848, but in the amendment made in 1849, were added to § 379 (Laws of 1849, p. 689), and are retained in the amendments made in 1851. (*Vide* § 379 of Code as amended in 1851.)

The Code of 1849 (§ 136, sub. 1) has precisely the same provision as to the form and effect of the judgment as § 115 of

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the Code of 1848. Section 136 of the Code, as it was amended in 1851, provides, that if the plaintiff "recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants." Section 380, of the Code of 1849, and 1851, is a substitute for § 333 of the Code of 1848, and provides that the plaintiff may demur or reply to the defendant's answer; that the latter may demur to the plaintiff's reply, that the issues may be tried and "judgment may be given, in the same manner as in an action, and enforced by execution, or the application of the property charged to the payment of the judgment may be compelled by attachment, if necessary."

While this proceeding to summon the party to show cause why he should not be bound by the judgment, treats the judgment as the debt, demand, or liability, which is to be enforced, the statute providing for it gives greater effect to a joint-debtor judgment, than the act of 1830. The party not served is not to be sued on the original cause of action. He is not to be proceeded against as a party indebted on contract, and cannot be. As the Code provides "that no action shall be brought upon a judgment rendered in any court of this state, except a court of a justice of the peace, without leave of the court on good cause shown on notice to the adverse party (Laws of 1848, p. 510, § 64, and Code of 1851, § 81), it was therefore necessary that some provision should be made, by which a plaintiff having a joint-debtor judgment might proceed as a matter of course and of right to enforce it against the party not served. That proceeding is descriptive of the effect of an action under the former system upon the judgment. The purpose of that was to establish the fact of the defendant's obligation to pay the judgment, and the effect of a recovery was a legal adjudication that such liability existed and must be satisfied.

Under the proceedings prescribed by the code the defendant not served is summoned to show cause why he should not be bound by the judgment, in the same manner as if he had been originally summoned. He is not to be sued on the contract; the summons "shall describe the judgment," and not the ori-

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ginal liability. The answer may deny the judgment, or set up its payment or discharge, and the defendant may make the same defence which he might have originally made to the action, except the statute of limitations. The judgment by existing laws, saves the liability to pay the judgment from being defeated by a plea of the statute of limitations to the original cause of action. The case of *Bruen v. Bokee* was decided in 1847, but the 4th of Denio in which it is reported, was not published until 1849: whether the knowledge of that decision, or the obvious justice of the provision, induced the amendment made on the 11th of April, 1849, to the Code (§ 379, p. 689 of Laws of 1849), is not very important. It was made, and is now the law of the land.

Suppose a plaintiff, having a joint-debtor judgment, recovered in a suit commenced since the Code took effect, should apply for an attachment against the defendants, as non-residents, on what should his application state that his demand arose? Might he not, and must he not, if he would be technically accurate, state that he had a demand arising upon judgment? The only thing upon which he can bring the party not served into court, is the judgment. The debtor is to be called in to show why he should not be bound by it, and adjudged to pay it. If a party has a judgment, which, upon facts existing and susceptible of proof, the law declares the defendants liable to, and which the court will adjudge they shall pay, has he not as emphatically a demand against them, arising upon judgment, as it can be said that a plaintiff has one arising upon contract, who owns a contract, upon which the law will hold the other parties to it bound by it, and which the court will coerce them to perform?

Can it be possible, if this is so, that a plaintiff in a joint-debtor judgment, recovered under the act of 1830, which he can show all the parties defendants are liable in justice and equity to pay, has not a demand against all arising upon judgment? From 1788 to 1830, it is conceded that a plaintiff, having such a judgment, had such a demand.

A plaintiff, recovering such a judgment, in an action commenced since the first of July, 1848 (Laws of 1848, § 391), has such a demand. The form of a joint-debtor judgment in

actions commenced between the first of January, 1830, and the first of July, 1848, was required to be the same in all respects, as those recovered prior to 1830.

The simple proposition involved in this case, when stripped of all extraneous considerations, is merely this, and no more: Is a plaintiff in a joint-debtor judgment, recovered under the act of 1830, which each of the defendants is justly liable to pay, and amounting, with interest, to some fifty thousand dollars, to be turned out of court with a loss of his demand, and amerced in costs, because, in stating what his demand was, he said it arose upon this judgment?

Has a plaintiff, who has recovered such a judgment against two joint debtors, regularly in all respects, as provided by statute, one which the statute calls a judgment, which is wholly owing and unpaid, one on which he can sue and recover from both the whole amount of it, a demand against both, "arising upon judgment," within the meaning of those words, as used in 2 R. S. P. 3, § 3? This statute took effect at the same time as 2 R. S. P. 299, §§ 1 and 2. Within the meaning of those words, as used in the former statute, can it make any difference by what evidence the liability is to be established? Whether the record is to be conclusive, *prima facie*, or no evidence of such liability, so long as the liability exists in fact and in law, and can be established by evidence allowed by law? By whatever evidence the liability may be established, may it be fairly and reasonably said that such a plaintiff has a demand against the two, arising upon a judgment? That is the grave question, the ultimate decision of which must determine whether a plaintiff thus situated, with such a claim, conceded to be just and unpaid, is to lose his debt or recover it. By the decision to be made, the wisdom and regard for substantial rights with which justice is administered by the courts of the State of New York, are to be vindicated. An affirmative answer maintains important and conceded rights, secures to the plaintiff the payment of a large and (on the proof offered) a just debt, deprives the defendants of no defence, subjects them to the expenses of no new or intricate proceedings or remedies, embarrasses them by no surprise, no new construction of a statute, or by any departure from familiar and settled practice,

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or a single adjudication of any court that now exists, or ever existed under the authority of this state.

A negative answer deprives a plaintiff of the payment of a large and just claim, after his right to collect it has been proved, by abolishing a remedy sanctioned by a long series of deliberate and well considered adjudications; by overturning a practice so long pursued, that it was declared twenty years ago to be too well settled to have the right to follow it called in question; and by a grave judicial decision that the words, "a demand arising upon judgment," cannot be satisfied with proof of any thing less than of a demand originating solely and exclusively from a judgment which is itself the liability and the sole evidence of such liability. This answer is to be given, if given at all, with the fact conceded that a plaintiff may have, and that this plaintiff has, a judgment—provided for, required, and declared by statute to be a judgment—on which, and the facts stated in it, both Young and Baker justly owe him the whole amount which he claims to recover, and that the facts stated in it are true in manner and form, in spirit and in substance, as they there appear and are set forth. I think the plaintiff, within the fair meaning of the words as used in the statute under which his attachment was issued, has such a demand as was set forth and stated in his application; that on the evidence given and proffered he was entitled to recover; and that the judgment of the special term should be reversed, and a new trial ordered.

My brethren, upon consideration, fully concur with me in the view of the law that I have taken, and that no principle in conflict was settled by the Court of Appeals on the reversal of the judgment heretofore recovered by the plaintiff in this court in this action. Notwithstanding this, they think that a second judgment should not be allowed on the evidence on which the first one was recovered, although they think the plaintiff entitled to it by law, and that no principle adverse to his right to it has been determined by the court of last resort.

Under such circumstances, I do not see why it is not the duty of a court required to render judgment between the parties, to render it in conformity to its clear conviction of the law, or in what respect it is discourteous to a superior tribunal to so

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decide. No subordinate court, or any member of it, will hesitate to conform to any principle which the superior court may determine, or attempt to evade it. But when it reverses a judgment, as may and sometimes must happen, without the concurrence of a majority of its members in reversing any principle upon which it may be upheld, I do not understand on what ground a subordinate court is to act upon a re-trial of the cause contrary to its own judgment of the law.

SAMUEL WESCOTT v. ALFRED E. TILTON.

When ale is sold in barrels, with an understanding that the barrels shall be returned, and, if not returned, be charged to the purchaser at a stipulated price, the contract in relation to the barrels is a bailment, not a sale.

The purchaser under such a contract, having sold the ale to the defendant with a similar understanding as to the barrels—*Held*, that the owner, the first vendor, upon proof of demand and refusal, was entitled to recover their value.

(Before SANDFORD, DUER, and BOSWORTH, J.J.)

April 14, May 29, 1852.

THIS was an action to recover the value of seventy-four iron-bound ale-barrels, as unjustly obtained by the defendant, and was tried before the Chief Justice and a Jury in October term, 1851.

The facts proved on the trial were that the plaintiff, who is a brewer in New York, in March, 1850, sold a large quantity of ale in iron-bound barrels to Sherburne & Son, of Boston, who shortly thereafter sold one hundred barrels of the ale so purchased to the defendants under a similar understanding as to the return of the barrels. In the same month of March, the plaintiff, through an agent, demanded from Sherburne & Son, who had then become insolvent, a return of the empty barrels, and received from them the following order on the defendant:—

“*Boston, March 18, 1850.*

“74 ALE BARRELS. MR. ALFRED E. TILTON.—Please deliver

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Samuel Wescott, or order, Seventy-four empty Ale Barrels, said barrels being the property of said Wescott.

(Signed) "SHERBURNE & SON."

The defendant, when some time thereafter the order was presented to him by the plaintiff's agent, refused to deliver the barrels, alleging that Sherburne & Son were indebted to him, and that he meant to retain the barrels, and apply their value or price in part satisfaction of his claim.

Upon this evidence, the counsel for the defendants, upon the trial, moved for nonsuit, upon the ground that the sale to Sherburne & Son was an entire contract, and in its legal construction embraced the barrels as well as the ale, but with a privilege to the purchasers of returning the barrels within a reasonable time. That the action, therefore, in its present form, could not have been maintained even against Sherburne & Son. *A fortiori*, could it not be maintained against the defendant, between whom and the plaintiff there was no privity whatever. The Chief Justice denied the motion, and the counsel excepted to the decision.

It was then proved, on the part of the defendant, by the assignee in bankruptcy of Sherburne & Son, who was appointed in May or June, 1850, that late in the December following he made a settlement for the barrels with the defendant, by the latter allowing the price, as a part payment on a protested note which he then held against Sherburne & Son.

The value of the barrels, at \$2 per barrel, with interest to the 15th October, 1851, was estimated to be \$164⁴⁰/₁₀₀, and the Chief Justice directed the jury to find a verdict for the plaintiff for that amount, subject to the opinion of the court at a General Term, upon a case to be made by the plaintiff, with liberty to either party to turn the same into a bill of exceptions.

April 14.—The cause was now argued upon the case so made, by *G. Bowman*, for the plaintiff; and *J. R. Jessup*, for the defendant.

May 29.—BY THE COURT. SANDFORD, J.—There was no sale of the barrels by the plaintiff to Sherburne & Son.

The evidence shows that when the plaintiff sold ale to that firm, he loaned to them the barrels in which the ale was contained, to be returned to him as soon as the ale was drawn out; with an agreement that if, for any cause, it became impossible for Sherburne & Son to return any of the barrels, they should pay for such barrels at a rate stipulated.

This agreement was for the benefit of those purchasers, so that instead of being subjected to a suit for a tort in the event of their default to return all the beer casks at the proper time, they should be liable only for their value as upon a contract of sale at a fixed price.

When the beer casks in question were delivered to Sherburne & Son, they were the property of the plaintiffs. If they had been lost on the voyage to Boston, or burnt after their arrival there, the loss would have been his, and they continued to be his property up to the period that Sherburne & Son delivered them to the defendant.

The cases of *Smith v. Clark*, 21 Wend. 83, and *Norton v. Woodruff*, 2 Comst. 153, to which we were referred, are not analogous—those were instances of the exchange of wheat for flour—the flour to be received was not to be the product of the wheat delivered. There was no stipulation or expectation that the flour to be returned was to be manufactured from the wheat so delivered.

The courts therefore held that there was no bailment of the wheat; that it was a sale payable in flour, and that the title to the wheat passed on its delivery. Here, by the contract between the plaintiff and Sherburne & Son, the casks in which the ale was delivered, branded with the plaintiff's name—the specific thing were to be returned, and not a substitute. It is, therefore, more like the case of *Mallory v. Willis*, 4 Comst. 76, where flour to be made out of the wheat delivered was to be furnished to the owner of the wheat, and the Court of Appeals decided that it was a bailment of the wheat and not a sale. And see 2nd Kent's Com., 755, note 1, 7th ed.; *Sargent v. Gile*, 8 New Hampshire R. 325, and *King v. Humphrey*, 10 Penn. R. (by Barr) 217.

We were also referred to a case in the Supreme Court in this district (*Westcott v. Thompson*) involving in part the question

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presented here. That court, reversing the finding of a referee, appears to have held on the evidence that there was a sale of the casks and not a bailment. The facts presented were somewhat different from those in the case before us. The plaintiff seems to have relied mainly upon proof of a usage in the trade, and it was shown that he received in return the barrels of other brewers in lieu of his own. These circumstances probably influenced the judgment of the Supreme Court in giving their decision upon the contract, and they make the case to differ so far from the one before us, that it does not possess the weight of an authority on the point. After fully regarding the views of that learned court, so far as the two cases are analogous, and carefully considering the point as it is presented to us, we were entirely convinced, as we have already stated, that the contract was one of bailment, and that there was no sale of the casks to Sherburne & Son.

The right set up by the defendant remains to be considered. He claims to be a purchaser of the casks in good faith, and to have the superior equity to retain them.

But first he takes the ground that Sherburne & Son had the election, if the delivery to them were a bailment, to keep the casks, if they thought proper, and to pay for them at the stipulated price.

We do not so understand the contract. If the casks were in the store of Sherburne & Son empty, we have no doubt the plaintiff could compel their delivery to him, and maintain an action of replevin, if such delivery were refused. The privilege to account for the casks at the price agreed, was applicable only to the case of an inability to return the casks, not to a voluntary retention of them.

They might be unable from various circumstances, and an instance of a sale of the ale in casks to a remote town or a distant port, might be one of those circumstances. Without speculating, however, upon the precise nature or degree of the inability which would have entitled Sherburne & Son to pay for the casks instead of returning them, it is clear that such inability was the sole ground and extent of the privilege.

Next, the defendant's right as a purchaser. While we hold the contract to have been a bailment only, at the same time

we are prepared to say, that as against the plaintiff the agreement for receiving the value of the casks which Sherburne & Son were unable to return, would in favor of a *bonâ fide* purchaser of the casks from them, without notice of the bailment, be evidence of an authority to them to sell the casks. It would be so on the ground, that the plaintiff in favor of such a purchaser ought to be estopped by that agreement, and the apparent ownership of Sherburne & Son, from denying that they had such an authority.

But the defendant does not stand in the position of a purchaser in good faith, who has paid value upon the strength of Sherburne & Son's right to sell the casks. He bought the ale of them, with the understanding that the barrels were to be returned, or to be paid for. They were not paid for. The ale was sold to him when it was delivered. The barrels were not. If he had the pure option of electing to keep the casks and pay for them, he did not exercise the right. There is no evidence that he ever thought of keeping them until after Sherburne & Son failed. After that event, and some months after the casks had been demanded of him in behalf of the plaintiff, he attempted to pay for the casks to the assignee in bankruptcy of Sherburne & Son by offsetting their value against a protested note of that firm held by him. It does not appear that he had this note when the firm failed or when the casks were first demanded. And after that, it was too late for him to influence the plaintiff's right as the real owner, to have the casks returned to him.

Besides all this, the evidence would warrant a jury in finding that the defendant received the casks from Sherburne & Son on the same terms and conditions that they received them from the plaintiff, and that he never had a right to elect to become the purchaser of the casks.

On both grounds we are clear that he had no just claim to withhold the casks from the plaintiff, and there must be a judgment for the latter for the amount of the verdict. Judgment for plaintiff.

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BELL v. HOLFORD et al.

The firm of S. D. & Co. being insolvent, executed an assignment of their partnership effects to the defendants in trust for the payment of their debts. Subsequent to the execution of the assignment, they executed to S., one of the firm, an agreement in the words and figures following:

"Whereas several suits are now pending in one or more courts of law and equity, in the State of New York, and in other States in the United States of America, for the purpose of recovering certain claims or demands belonging to, or in which the Trustees of the estate of the late firm of Stainer, Dutilh & Co. are now interested, and in which several suits so depending, Edward Stainer, one of the members of the said firm, is made a party plaintiff or defendant, and such suits being for the benefit of the Trustees of said estate:

"Now for and in consideration of the premises and other good and sufficient considerations, we, Holford, Brancker & Co., and Peter C. Pfeffel, the Trustees of the said estate, do hereby agree to pay and discharge all costs, damages, and charges out of the proceeds of said estate, which may arise in consequence of any or either of said suits; and agree and promise to save harmless the said Edward Stainer from any liability or claim by reason thereof."

In an action by the assignee of S. to enforce payment of damage and costs incurred by him in actions concerning property held by him individually,

Held, 1. That the agreement was single and entire, and the indemnity which it promised, was an exclusive charge upon the property assigned.

2. That the agreement embraced only those suits in which the Trustees were interested; that it did not therefore embrace such as concerned property, which did not pass to them by the trust deed; that if it had been intended to embrace such suits, it would have been invalid, and would not be enforced by a Court of Equity.

3. That by the assignment of the defendants for the benefit of their creditors the rights of the partnership creditors were fixed, and could not be varied by any subsequent act of the partner or trustees. That, by the terms of the assignment, the property was to be devoted to the payment of partnership debts. Hence no subsequent agreement to apply a portion of it for any other purpose, could be upheld.

Parol evidence is admissible in many cases to determine and define the subject matter of a contract, when such evidence is explanatory; never when contradictory.

It was competent therefore in an action on the agreement in question, to prove what suits were pending, and how the trustees were interested, but not to prove that the agreement meant to embrace suits in which they were not interested.

It is not competent for an appellate court to alter a judgment given in the court below, when the party by his omission to appeal has precluded himself from denying its justice or propriety. An appellate court may in some cases modify or reverse in part a judgment or decree, but only when such modification

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or reversal is necessary to render the decree as finally pronounced entirely consistent.

(SANDFORD, DUER, and BOSWORTH.)

April 16, 1852; June 12, 1852.

THIS was an action, brought by the plaintiff, under an assignment from Edward Stainer, of an alleged cause of action, upon the following instrument executed by the defendants:

“Whereas several suits are now pending in one or more Courts of Law and Equity in the State of New York and in other States in the United States of America, for the purpose of recovering certain claims or demands, or resisting certain claims or demands belonging to, or in which the Trustees of the estate of the late firm of Stainer, Dutilh and Company are now interested, and in which said several suits so depending, Edward Stainer, one of the members of the said firm, is made a party plaintiff or defendant, and such suits being for the benefit of the Trustees of said estate. Now for and in consideration of the premises and other good and sufficient considerations: We, Holford, Brancker & Co., and Peter C. Pfeffel, the trustees of the said estate, do hereby agree to pay and discharge all costs, damages, and charges, out of the proceeds of said estate, which may arise in consequence of any or either of said suits, and agree and promise to save harmless the said Edward Stainer, from any claim or liability by reason thereof.”

The complaint set forth that in the year 1840 the firm of Stainer, Dutilh & Co., of which firm Edward Stainer was a member, failed in business, and executed an assignment of their property to the defendants and one Pfeffel, in trust to pay partnership debts, and that said assignment conveyed the individual property of Stainer as well as the partnership effects. That the property of Edward Stainer so conveyed, embraced certain real estate, situated in Sandusky City, Ohio, formerly purchased of one James H. Bell in January, 1837. That on this purchase Stainer had executed a bond and mortgage to Bell to secure \$4000 of the purchase money, which bond and mortgage were subsequently assigned to the plaintiff. That in the month of October, 1838, Stainer filed his bill in chancery against Isaac and James, to be relieved from this bond and mortgage, and for an injunction to restrain Isaac Bell from

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suing on the bond. This injunction was dissolved, and on the 12th of February, 1840, Isaac Bell commenced a suit on the bond, in the Supreme Court, in the name of James H. Bell against Stainer, and on 31st May, 1845, recovered judgment against him for \$8,000 debt, and \$2,081 damages and costs, of which \$181 were taxed as costs. That the bill in chancery was, on argument, dismissed by the Court of Appeals, in the year 1848, and the costs taxed at \$376³⁷/₁₀₀.

The complaint further stated, that the defendant in this action and Pfeffel were the principal creditors of the firm of Dutilh, Stainer & Co., and that at the time of the execution of the assignment before mentioned the defendant executed and delivered to Stainer the agreement of indemnity upon which the present action was brought, and that the consideration of the agreement was the execution of the assignment, which embraced Stainer's individual property, as well as that of the firm. That at the time said agreement was given, there was no debt or claim, or suit pending against Stainer individually, except the suits referred to connected with the Bell transaction. The complaint averred that Stainer being indebted to the plaintiff by reason of the judgments recovered in the action before mentioned, assigned the agreement of indemnity to him as collateral security.

The answer averred that the purchase of the Sandusky property from Bell was made by Stainer in behalf of the firm, and the conveyance was taken to him, because the others were aliens. The suits set up in the complaint were admitted, but it was averred that the suits were commenced long subsequent to the time stated in the complaint—the answer averred that the assignment of Stainer, Dutilh & Co., was made March 26, 1838, and set it forth as follows:

“For and in consideration of one dollar, and for other good and sufficient consideration, we, Edward Stainer and Eugene Dutilh, members of the firm of Stainer, Dutilh & Co., do by these presents assign, transfer, and set over unto Peter C. Pfeffel and Holford, Brancker & Co., all the property, bills receivable, and choses in action, of which the firm of Stainer, Dutilh & Co., are possessed, or have any claim to, and which are contained and set forth in page *Five* of the book in which this

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assignment is written, and which property, bills receivable, and choses in action, are therein estimated at the value of two hundred and eighty-two thousand four hundred and fifty-six dollars, be the same more or less. To have and to hold the said property, bills receivable, and choses in action for the special trust, however, namely: to divide the proceeds of said property, bills receivable, and choses in action, equally among the respective claims mentioned and set forth in page *Four* of this said book, paying such claims *pro rata* according to the amount due thereon respectively from the aforesaid firm of Stainer, Dutilh & Co.

“And for the purpose of carrying the trust herein mentioned into effect, powers of attorney have this day been made and delivered to the said Peter C. Pfeffel and Holford, Branker & Co., to do all things requisite and necessary in the premises.

“In witness whereof we have hereunto set our hands and seals this twenty-eighth day of March, one thousand eight hundred and thirty-eight.

“ED. STAINER, (Seal.)

“EUGENE DUTILH. (Seal.)

“Sealed and delivered in presence of

“JNO. STEEL.”

The answer also admitted the making of the agreement of indemnity at the time the assignment was executed, but denied that it was executed in consideration of the assignment. It also denied that the suits against Stainer, mentioned in the complaint, were pending at that time, or that they were commenced until many months thereafter, or that the agreement embraced such suits, or the causes of action connected therewith. The answer also denied the amounts claimed in the complaint to have been recovered in the judgments against Stainer.

The reply of the plaintiff put in issue the averments of the answer inconsistent with the allegations of the complaint.

The cause came on to be heard at a special term of the Superior Court, before Mr. Justice Campbell, on the 19th November, 1851. Upon the hearing of the case, it was admitted that Stainer made the purchase of the Sandusky property, and executed the bond and mortgage as averred in the complaint; also, that the suit of Bell in the Supreme Court

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was commenced on the 12th February, 1840; that judgment was entered up for the amount stated in the complaint, on the 31st day of May, 1845. That the costs of Isaac Bell in the chancery suit, before the Vice-Chancellor, were taxed on the 1st September, 1848, at \$224 85; that the costs on the appeal to the Chancellor were taxed at the sum of \$61 88, and on the appeal to the Court of Errors, at the sum of \$89 64; that the costs in the Supreme Court suit were taxed on the 31st May, 1845, at \$2,061 12, of which sum \$1,880 were taxed for interest upon the bond. The assignment by Stainer to the plaintiff, of the agreement of indemnity, was also admitted. The taxed bills referred to, were produced upon the trial, also the assignment of Dutilh, Stainer & Co., and the agreement of indemnity, and were all admitted in evidence. It further appeared in evidence on the part of the plaintiff, by the testimony of N. Dane Ellingwood, Esq., that he was the counsel of Dutilh, Stainer & Co., and of Edward Stainer, in the matters referred to; that he drew up the assignment of Dutilh, Stainer & Co., made for the benefit of their creditors, and also the agreement of indemnity upon which this suit was brought, which was executed subsequent to the assignment.

Mr. Ellingwood further testified as to his consultations with Stainer as to the Bell suits, and as to the circumstances connected with the agreement of indemnity, as follows: "The costs were likely to be heavy on that suit, and there was chance of his being liable on the bond. From these considerations it is now my belief, and I speak from recollection of all the facts, I recommended the bond of indemnity to be executed, and it was so. I cannot recollect any reason for giving the instrument of indemnity except those which I have given. I am pretty certain that there was no suit against Stainer except one small one for a few hundred dollars which was brought by one Hatien, quite certain. I never knew the firm to be sued, nor Stainer either, with that exception, and the case of Bell. The Hatien claims had no connection with this indemnity. It was settled before the failure. I never had any suits in which Stainer was plaintiff, except some creditors' bills; none of these were pending when the house failed. There might have been creditors' bills on the part of the house and Stainer. I

remember one against Beach & Hamneker. That was settled before the failure. This was the only one in which Stainer was plaintiff in equity; it was of but little importance. There was no chancery suit after the firm failed, except this one in the complaint, and I think I may safely say there was none. I received the money to carry on these suits, the suits mentioned in the complaint, from Holford, or his clerk Kingsford, and Mr. Holford himself has paid me some counsel fees in these suits. I went to the house of Holford, Brancker & Co., for my fees. I never received any that I recollect from any one else. I recollect one time Holford objecting to my fees. His objection was, that the estate had nothing in it, or very little in it, that was the reason he gave me. He said he had paid the estate all out in counsel fees. This was my counsel fee for the appeal. I recollect one time Holford giving me as a reason that he was in advance, and I knew better, and I wrote to Stainer, and then he paid me counsel fees to the Court of Appeals. I have not the slightest doubt that the instrument of indemnity was executed after the suit; I can say everything except that I know it for a fact. I had my charges objected to once or twice on the ground that the estate would not warrant it, and then I complained to Mr. Stainer, and Mr. Stainer then complained to Mr. Holford on the ground of this instrument."

This evidence was objected to by the defendants' counsel, but admitted by the judge. The defendants, after reading in evidence the assignment of Dutilh, Stainer & Co., also read in evidence the letters of Edward Stainer, one dated March 30th, 1850, and the other April 7th, 1843, addressed to the defendants, in which he recites the fact of the execution of the agreement of indemnity, and refers to the fact that it was given in consequence of his signature being affixed to the bond and mortgage covering the Sandusky property, he being a naturalized citizen, and the others of the firm were not. In these letters his claim to indemnity from the suits of Bell is affirmed. It also appeared in evidence that the schedule annexed to the assignment of Dutilh, Stainer & Co., embraced the property at Sandusky.

The presiding justice rendered his decision in writing, by which he found that "the Agreement or Instrument of Indem-

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nity, executed by Peter O. Pfeffel and the said defendants, under their hands and seals, and referred to or set forth in the pleadings in this action, was executed by them after the commencement of the suit in chancery brought by Edward Stainer against the above named Isaac Bell and James H. Bell in the complaint in this action referred to, and after the commencement of the suit in the Supreme Court brought by the said Isaac Bell in the name of James H. Bell, against the said Edward Stainer and in said complaint referred to, on the bond therein also referred to, and that the said Agreement or Instrument of Indemnity was intended to indemnify the said Edward Stainer against this liability on the said bond to the said Isaac Bell on the said bond and on the judgment recovered thereon, and against his liability to the said Isaac Bell for the costs in said suit in chancery, and on the appeals therein, to the extent of the proceeds of the property assigned by the firm of Stainer, Dutilh & Co. to the said defendants and P. C. Pfeffel by deed bearing date the 26th day of March, 1838, and that the said Agreement or Instrument of Indemnity was a personal covenant or obligation binding on the said defendants, to save the said Edward Stainer harmless against the aforesaid liability to the said Isaac Bell to the extent of the proceeds of the said estate assigned, and to pay to the said plaintiff the amount of his said claims against the said Edward Stainer, under and by virtue of the assignment by the said Edward Stainer to the said Isaac Bell, bearing date the 24th day of April, 1850, to the extent of the property so assigned to them as aforesaid, subject to the deduction, as the case may be, of the costs and counsel fees hereinafter referred to, and that the said Isaac Bell is entitled to judgment against the said defendants for the sum of nine thousand, two hundred and forty-two dollars, and thirteen cents, with interest thereon from the 20th day of November, 1851, with costs of this action. And if the proceeds of the said assigned property, arising from the sales of real estate, and of debts and dues collected or otherwise under the aforesaid assignment, and the value of the residue of said assigned property unsold and uncollected, should be sufficient to pay the whole of the said sum of \$9,242 ¹³/₁₀₀, and interest thereon as aforesaid, after deducting from such proceeds such sums of money as have

been paid by the said defendant to N. Dane Ellingwood for reasonable costs and counsel fees in prosecuting and defending the suits herein above referred to, then and in such case the said plaintiff is entitled to enforce payment by execution of the whole of the said sum of \$9,242 $\frac{13}{100}$, and interest thereon as aforesaid; but if the said proceeds, and the value of the real estate assigned remaining unsold, and of the debts and dues uncollected, should not be sufficient, after such deduction, to pay the whole of the said sum of \$9,242 and thirteen cents, and interest thereon as aforesaid, then and in such case the said Isaac Bell is and shall be entitled to enforce payment by execution against the said defendants of so much only of the said sum of \$9,242 and thirteen cents, and of the interest thereon as aforesaid, as the said proceeds and the value of the estate assigned, unsold and uncollected, shall amount to after such deduction as aforesaid, but shall be entitled to enforce payment by execution against the said defendants of the costs of this action absolutely and without reference to the said assigned property."

A. G. Rogers, for the plaintiff, argued the following points :

I. The plaintiff was entitled to recover under this instrument of indemnity, the amount claimed by him, absolutely and without reference to what was received by the defendants out of the proceeds of the estate assigned, because that instrument is a valid and binding agreement, founded on good and sufficient considerations, referred to and embraced these two suits and Stainer's liability therein, and bound the defendants personally to save Stainer harmless out of their own moneys, against any claim or liability by reason of those suits. 1. It is a valid and binding agreement. Because, being under seal, it of itself imports a consideration. (13 Wend. 537; 16 Do. 502; 21 Do. 522.) Because, besides being under seal, a consideration is expressed in the instrument itself. (16 Wend. 403.) If there were no seal, and no specific consideration were expressed, or if that expressed was not in itself a sufficient consideration, yet the defendants, having expressly declared by the instrument itself that they executed it "for other good and sufficient con-

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siderations," are precluded from denying what they have thus solemnly asserted under hand and seal. 2. The instrument of indemnity referred to and embraced these two suits mentioned in the complaint, viz. the suit in the Supreme Court on the bond, and the suit in Chancery. This is the legal presumption until the contrary be shown, because the suits referred to in the instrument and in the complaint correspond; more especially as not only are no other suits shown to have then existed, but it is affirmatively proved by N. D. Ellingwood, that there were at that time no other suits answering the description of these, and none of any kind whatsoever against Stainer, at or after the failure of Stainer, Dutilh & Co. Independent of the intrinsic evidence which the instrument itself affords, the fact that the instrument of indemnity referred to and embraced the suit on the bond in the Supreme Court and the Chancery suit, and Stainer's liability therein, is set at rest by the testimony of N. D. Ellingwood, who not only testifies as to this fact, but also states the reasons which induced him to propose the drawing up of the instrument, viz. to protect Stainer against his liability on the bond and the costs of the litigation. He proves that the instrument was executed after the assignment and after the suits were brought. He proves that Holford, Brancker & Co. ratified the instrument, and acknowledged their liability to save Stainer harmless in these suits by paying the counsel fees therein; and that at one time, when Holford objected to paying further fees, witness complained to Stainer, and then Holford paid witness his counsel fees up to the Court of Appeals. Stainer's letter of April, 7, 1843, and that of March 30, 1850, produced by defendants. In the letter of April 7, Stainer refers to Ellingwood's having written to him in consequence of the trustees declining to advance funds to carry on the defence to the suit on the bond, and then refers them to this instrument as the reason why they should advance the funds to defend; and alludes to their responsibility under the instrument. So in his letter to Holford, he alludes to this instrument, as given to him individually, to save him harmless from liability—refers to a sketch inclosed in the letter, and to this bond, and to the judgment on the bond, as forming the prominent item in that sketch; and he refers to this instrument of indemnity as the means of taking

his redress against the defendants, but that not possessing the means to meet the judgment and take his redress thereafter against them on the indemnity, he transferred the indemnity to the plaintiff for direct action against the assets of the estate to pay the judgment. Independent of the intrinsic evidence derived from the instrument itself, and the testimony of Ellingwood, that the suits mentioned in the complaint, viz. the suit on the bond in the Supreme Court, and the Chancery suit, are those referred to in the instrument, the letters above referred to produced by the defendants themselves, and consequently their own testimony, are conclusive on the point, for they take broadly and expressly, the ground that the defendants are liable for this very claim. The defendants have repeatedly and for years acknowledged that the suits mentioned in the complaint and those referred to in the instrument, are the same, and have also acknowledged their liability and ratified the instrument of indemnity, by paying to the attorney, solicitor, and counsel of Stainer, his charges throughout, from the beginning to the end; and once or twice, when Holford objected to paying further fees, and Ellingwood complained to Stainer, and Stainer to the defendants, on the ground of this instrument of indemnity, then the defendants re-acknowledged their liability, by paying them up to the close of the litigation, viz. in the Court of Appeals. The defendants have also admitted the identity of the suits mentioned in the complaint and in the instrument, and their liability to Stainer, and the fact of their ratification of that instrument, by not denying in their answer the averment set forth in the complaint. (1 Comst. Rep. 96, *French v. Carhart*.) 3. The instrument bound the defendants personally to save Stainer harmless out of their own moneys, absolutely, without reference to the amount of funds received by them. The instrument consists of two separate promises or agreements: The first agreement or promise is, "to pay and discharge all costs, damages, and charges, out of the proceeds of the estate, which may arise in consequence of any or either of said suits; that is, by reason of any or either of said suits." The second agreement or promise is: "agree and promise to save harmless the said Edward Stainer from any claim or liability by reason thereof," that is, by reason of any or either

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of said suits. The first promise restricts itself to the amount of the proceeds of the estate (assigned). The second promise is more comprehensive—it is unrestricted: it is to “save harmless, and from any claim or liability. Now, the words “save harmless,” in themselves, express an unqualified, absolute indemnity, and can, from their very nature, mean nothing else. A contingent, restricted, or limited indemnity, might give no effect whatever to the agreement; for if no funds were received, there would in such case be no liability—no effect given to the instrument: whereas the instrument says, “we agree to save harmless from any claim or liability by reason of any or either of said suits.”

II. The court, which by the written consent of the parties was substituted in the place of a jury, having found as a fact that the instrument of indemnity was executed after the commencement of the suits in the Supreme Court and Court of Chancery mentioned in the complaint, and that the instrument was intended to indemnify said Stainer against his liability on the said bond and on the judgment recovered thereon by Bell against Stainer, and the costs of the suit in chancery and on the appeals therein, the finding is conclusive, being a question of fact; and the only question can be, whether the plaintiff shall be confined in his remedy to the extent of the assets.

III. This instrument being an agreement to indemnify Stainer against any claim against him, or liability on his part, he would have a perfect right to recover of the defendants the amount due on the judgment recovered by Bell against him, and the costs of the suit in chancery, without first paying the same; and the plaintiff, under the assignment to him, has all the rights which Stainer had. (19 Wend. 423, *Webb v. Pond and others*; 1 Comstock, 550, *Gilbert v. Wynans*; 8 Wend. 451; 8 Cow. 623, *Rockfellow v. Donnelly*.)

T. W. Tucker, for the defendants, argued—

I. That the defendants were not liable, because the suits described in the complaint out of which the plaintiff's claim arose were not pending at the execution of the agreement of indemnity or of the assignment, and were not intended or referred to by said agreement.

II. The debt and costs which the plaintiff claims to recover do not arise out of any suits described in or contemplated by the agreement to indemnify. That agreement proposes to provide against costs and damages arising out of suits relating to the co-partnership estate, or in which the trustees have an interest. The suits described in the complaint, and upon which the plaintiff's right of action depend, relate exclusively to a bond and mortgage of Edward Stainer, given for the purchase money of real estate, which the complaint avers he purchased, and for which a deed was given to him individually and not on co-partnership account. It does not appear that he has ever conveyed the said property to any one else. The property did not pass by the assignment to the trustees. The assignment proposes to convey co-partnership property only. The suits brought on the bond of Stainer, and to set aside the mortgage, had no reference to the co-partnership estate, nor to property in which the trustees had an interest.

III. The admissions of Stainer, upon whose right of indemnity the plaintiff claims to recover, are conclusive as to the fact that the suits out of which the plaintiff's right arises were not pending at the execution of the agreement. Such admissions would have been conclusive upon Stainer himself. They were made before the assignment of his right of action to the plaintiff. The complaint seeks for no relief beyond such as Stainer could have claimed. The assignment to the plaintiff was without any consideration present, and to secure an already existing debt.

IV. The testimony of Ellingwood was inadmissible, and should have been rejected, because, (1.) It was introduced to explain and vary the terms of a written agreement. (2.) It contradicts the admissions and statement of the complaint and replication. (3.) It is at variance with the admissions of Stainer.

V. The agreement of indemnity contains no provision beyond taxable costs, and expenses incidental to the prosecution or defence of certain suits then pending. It could not have intended, nor does it promise to pay a debt due (if at all) before the commencement of such suits, and not arising there-

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from. The agreement, if valid at all, was a promise on the part of the assignees to pay the legal charges of a suit to set aside a fraudulent sale, not to pay for real estate for which Stainer was already liable.

VI. The construction which Stainer's assignee seeks to place upon the agreement of indemnity is fraudulent as to the creditors, and would vitiate and nullify that instrument. (1.) The assignment to pay specific debts, conferred rights and priorities on the creditors which are entitled to protection. (3 Hill, 228; 11 Wend. 240.) (2.) A subsequent agreement, without the knowledge of creditors, to appropriate the assigned property for the benefit of one of the assigning partners, is fraudulent, and confers no right of action. Such an agreement would have been an attempt by one of the partners to change the order of preference ordered by the assignment, and was fraudulent and void on its face. (*Strong v. Skinner*, 4 Barb. 559.) It was a reservation on condition for the benefit of one of the parties. (*Grover v. Wakeman*, 11 Wend. 187; *Mackie v. Cairns*, 5 Cowen, 547.)

VII. There was no consideration to support a promise on the part of the defendant to indemnify Stainer, for Stainer transferred none of his individual property to the defendants. The property specified in the assignment was transferred as co-partnership property, and its disposition unalterably fixed by the terms of the assignment. The defendants received nothing as security for their personal liability.

VIII. Neither Stainer nor his assignee can acquire a right of action from his own personal wrong. He cannot compel the application of the co-partnership estate to the payment of his individual debts, after, by his own action, rendering such a disposition legally impracticable.

IX. Even if the agreement as construed by the plaintiff were valid, the present action must fail. The assignment has established an order of preference, to which the plaintiff's right is subject. The plaintiff, before claiming a personal responsibility from the defendant, was bound to prove the receipt of assets, and the payment of other creditors, or that the estate had been exhausted.

X. The defendant was a creditor of the firm of which Stainer was a member, and would have a right to set off such debt against any personal claim of Stainer or his assignee.

By THE COURT. DUEB J.—It was insisted, by the counsel for the plaintiff, that the agreement of the defendants, upon which this action is founded, contains two distinct independent stipulations—the first, binding them to satisfy the costs, damages, and charges arising from the pending suits, to which the agreement refers, out of the proceeds of the estate assigned to them; the second, an absolute unconditional promise of indemnity, rendering them liable as individuals, and not merely as trustees. This construction, however, has been rejected by the judge at Special Term, who has decided that the agreement is single and entire, and the indemnity which it promises, an exclusive charge upon the property assigned, and we are satisfied that his decision expresses truly the intention, and is entirely consistent with the language of the parties.

The supposition that the defendants meant to assume the debts of Stainer to any extent, beyond the funds they might be able to realize from the trust estate, is most improbable; there could be no motive or consideration for such an undertaking, nor could we be justified in saying that such was their intention, unless the terms of the agreement were so explicit as to exclude the possibility of a different construction. We add, that had our opinion upon this question coincided with the argument for the plaintiff, it would not be competent to us, as an appellate court, to alter, in conformity to that opinion, the judgment that has been given, since the plaintiff, by his omission to appeal, has precluded himself from denying its justice or propriety. He has virtually assented to the judgment as it stands. He has no right to say that it has not given to him all the relief to which he can be entitled, and hence the objections which the defendants, as appellants, have raised, are those alone which we have the right to consider. It is true that an appellate court may, in some cases, modify, or even reverse, a part of a judgment or decree which is not embraced in the appeal, but we apprehend that this proceeding can only be justified where the

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modification or reversal is necessary to render the decree, as finally pronounced, entirely consistent.

The only questions, therefore, that we propose to examine are—first, whether the suit in chancery to set aside the mortgage, and the suit in the Supreme Court upon Stainer's bond, were the pending suits to which the agreement referred; and, second, whether, assuming this to be the fact, an agreement to satisfy the costs, damages, and charges that might arise from these suits out of the proceeds of the trust estate, has created any obligation which a court of law or equity is bound to enforce.

The agreement is without date, nor is it possible to fix with any certainty the period of its actual execution and delivery.

The complaint alleges that it was made at the same time as the assignment, or shortly thereafter, and the answer admits, or asserts, that both instruments were executed and delivered at the same time. Yet, unless the testimony of Mr. Ellingwood is to be wholly rejected, we are compelled to say that the allegations and the admission are alike erroneous, and indeed it is only upon the supposition that they are so, that the plaintiff, by any possibility, can be entitled to recover. The assignment was made in March, 1838, and, according to the testimony of Mr. Ellingwood, no suit was pending at that time in which Stainer individually was plaintiff or defendant, and it is against such suits alone, as we construe the agreement, that he was meant to be indemnified. The chancery suit was commenced in October in the same year, and the suit in the Supreme Court not until February, 1840, and unless the execution of the agreement may be referred to a still later date, there is no pretext for the claims which, by sustaining this judgment, we are required to enforce. It is to suits actually pending at the time of its execution that the indemnity which the agreement promises is expressly confined, nor is it denied that such is the construction that we are bound to adopt. Let it be admitted, for the present, that both the suits in question were pending at the time of the execution and delivery of the agreement, the mere fact of their pendency is by no means sufficient to prove that they are the suits to which it refers. To justify us in adopting this construction of the meaning of the parties it must be at least consistent with the terms of the agree-

ment, and it is manifest, that the terms may be such as wholly to exclude it. The suits against which alone Stainer was to be indemnified, are not specifically named in the agreement, but are described only in general terms, and it is therefore a first and necessary inquiry whether the suits upon the mortgage and the bond answer the description. If the description embraced only the facts that the suits to which the indemnity was to apply were then pending, and were suits in which Stainer was plaintiff or defendant, this necessary condition would be fulfilled; but if it embraces other facts, at least as material as those that have been mentioned, and the existence of these facts cannot be affirmed in relation to the suits in question, we know no rule of construction, or principle of equity, that could justify us in saying that they were the suits contemplated by the parties. On the contrary, we may be compelled to say that they were meant to be excluded.

What, then, are the terms of the agreement? Is the description of the suits intended limited to the facts that have been stated? By no means. It embraces the additional facts that the suits against which the trustees agreed to indemnify Stainer were suits in which they as trustees were then interested, and which were prosecuted or defended for their benefit; and these facts, so far from being regarded as immaterial, are stated as the leading consideration of the entire agreement. In our judgment, the truth of the description is thus made a condition precedent, necessary to be proved to give any effect to the stipulations that follow. It is of no importance whether other considerations operated upon the minds of the trustees, if it sufficiently appears, that, but for their supposed interest as trustees in the pending suits, they would not have entered into the agreement at all.

Were the defendants then, as trustees, interested in the suits in question? In other words, for such is the meaning, were these suits prosecuted or defended for the benefit of the trust estate? It might have been said that such was the fact in relation to the suit in chancery to set aside the mortgage, had it appeared that the title to the Sandusky lots covered by the mortgage was vested in the defendants as trustees, and that the necessary effect of a favorable decree would have been to have given them the lands discharged from the incumbrance, or to

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have entitled them, for the benefit of the trust estate, to the repayment of the \$2,000 which Stainer had originally advanced as a part of the consideration of the purchase. But we find no evidence whatever of these facts in the pleadings, documents, and testimony which form the case upon which our judgment must be given. It is true that the complaint alleges that the title to the Sandusky lots passed to the defendants by force of the assignment; but it also alleges that the lots were the individual property of Stainer, and that their transfer by him to the trustees formed the sole consideration of their agreement to indemnify him, and gave them an immediate interest in defeating the claims of the plaintiff upon the bond and mortgage. And, as we read and understand the complaint, it is upon the truth of these several averments that the plaintiff's title to relief is emphatically and exclusively rested. At any rate, it is upon the proof of each and all of these averments that his title to relief in our opinion entirely depends.

That the legal title to the Sandusky lots was vested in Stainer alone is quite certain, and is not denied, and the presumption therefore is, that he was the sole owner; but if they were his individual property, we can perceive no ground for the assertion that any interest in them, legal or equitable, passed to the defendants by force of the assignment. If they had no interest as trustees in the lots, they could have none in the suits upon the bond and mortgage. If not so interested, it follows that these suits were not those to which the terms of their agreement relate; and we add, that had it been proved that it was to these suits that the indemnity promised was meant to relate, the agreement would still be inoperative and void, from an entire failure of the consideration upon which alone it was or could be founded. The assumed fact that the defendants were interested as trustees in the Sandusky lots lies at the foundation of the plaintiff's case, and can alone sustain it. This foundation removed, the whole fabric falls to the ground.

The terms of the assignment to the defendants are explicit and unambiguous: they leave no room for argument as to the construction of the instrument. The transfer which it makes, so far from embracing the individual property of Stainer, is by express words limited to partnership property,—to property of

which the firm of Stainer, Dutilh & Co. were then possessed, or to which they had any claim. There was no such possession or claim in relation to the Sandusky lots, if they belonged to Stainer alone. It is true that in a schedule which is annexed to the answer the Sandusky lots are mentioned as a portion of the property assigned; but this circumstance we have no right judicially to notice, since the schedule was not in evidence in the court below; and, had the evidence been given, we do not understand how it could operate to enlarge the terms of the assignment so as to include the separate property of an individual partner. If the lots were in truth the property of the firm, they passed by the assignment, and not otherwise.

It is, however, impossible for us to say, upon the pleadings and evidence, that the lots were in any sense, legal or equitable, the property of the firm. It is true that the answer denying the averment in the complaint, that they belonged to Stainer alone, alleges that they were purchased with the funds of the partnership, and were therefore, although the legal title was vested in Stainer, really and equitably the property of the firm. But the reply makes a distinct issue upon these allegations, and no evidence whatever has been adduced to sustain them. Even had such evidence been given, it would have afforded no foundation for the relief which the plaintiff seeks, since the rule in equity is invariable, that a plaintiff is never entitled to a judgment unless the proofs upon which he relies correspond with the allegations in his complaint. As the case now stands, neither the plaintiff nor the court has any right to say that Stainer was not the sole and exclusive owner of the Sandusky lots. The conclusion is, therefore, not to be resisted, that, as the defendants as trustees had no interest in the lots covered by the mortgage, they had no interest in the suit instituted by Stainer to set it aside. That they had any interest whatever in the suit against Stainer upon his bond—the debt, damages, and costs on which amount nearly to the whole sum for which the judgment under review has been given—has not been and cannot be pretended. It is evident that whether he succeeded or failed in that suit was to them, as trustees, a matter of entire indifference. His success could not tend to enlarge nor his failure to diminish in any degree the trust estate. Judging, therefore,

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of the interest of the parties from the terms of their agreement, we are compelled to say that the indemnity promised to Stainer is not applicable to either of the suits to which the judgment that has been given alone relates, and consequently that the judgment, as founded either upon an erroneous interpretation of the agreement, or upon a mistaken view of the evidence or of the law, must be reversed.

We are told, however, that the doubts which might otherwise have existed as to the real intention of the parties have been wholly removed by the testimony of Mr. Ellingwood, who has positively sworn that the suits in question were those which were contemplated by the parties when the agreement was executed, and to which the indemnity then promised was meant to apply; and hence it has been argued that the question whether the defendants were or were not interested in these suits as trustees must be regarded as wholly unimportant, and the declaration that they were so be rejected as immaterial. But our own views are widely different. The question of the interest of the defendants is regarded by us as the vital question in the cause, the declaration of their interest as a necessary part of their agreement, and the proof, as indispensable to the relief which the plaintiff seeks to obtain; and hence the testimony of Mr. Ellingwood, so far as it is inconsistent with these views, must be rejected. Admitting for the present that the true import of his testimony is such as has been stated, it stands in plain opposition to the written agreement of the parties; and the object of its introduction was not to explain that agreement, but to overrule it. It appears from the case that this objection to his testimony was raised at the special term; and upon the fullest consideration we are satisfied that it ought to have prevailed. It is doubtless true that in many cases parole evidence not only may but must be admitted, to determine and define the subject-matter of a contract; but the evidence is only to be admitted when it is purely explanatory, never where it is plainly contradictory. In the present case, as the terms of the agreement were general, parole evidence was necessary to fix their application. Hence Mr. Ellingwood was a competent witness to prove what were the suits then pending to which the agreement referred, and how the defendants, as trustees,

were interested in their prosecution or defence ; but he was no more competent to prove that the agreement was meant to embrace suits in which the defendants were not interested than to prove that it embraced suits already terminated, or not then commenced. The actual pending of the suits was no more a necessary condition of the liability they meant to assume than their actual interest. The agreement limits the indemnity it promises to suits in which the trustees as such were interested : the evidence of Mr. Ellingwood is relied on as proving that it extended to suits in which they had no interest whatever. The contradiction is direct and positive.

Entertaining these views, we deem it needless to inquire whether we are bound to adopt that construction of the testimony of Mr. Ellingwood, upon which the counsel for the plaintiff have insisted. We content ourselves with remarking, that were we compelled to act upon his testimony as stated in the case, we should have great difficulty in saying that he meant to swear, that the suit upon the bond was actually commenced before the execution of the agreement. The heavy expenses that were likely to be incurred in the chancery suit, we understand him as saying, suggested to his mind the propriety of procuring for his client, Stainer, the bond of indemnity which the defendants consented to execute. We have seen that the chancery suit was instituted in October, 1838, and, from the nature of the controversy, it must soon have been known that the expenses of its prosecution would be heavy ; and it is therefore very improbable, that nearly eighteen months were suffered to elapse before the indemnity, to which Mr. Ellingwood thought his client was entitled, was in fact required. It is true, he says, that when the indemnity was required, there was a chance that his client would be liable on the bond, but that chance was just as probable when the chancery suit was instituted ; and if it had weighed with the parties, it would doubtless have caused an express stipulation to indemnify against the bond by name. He says nothing of the expenses of such a suit, and his language seems rather to indicate that it was anticipated, than that it was commenced.

It is not, however, alone upon the grounds, and for the reasons that have been stated, that we hold ourselves bound to

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reverse the judgment from which this appeal is taken. Waiving all objections to the testimony of Mr. Ellingwood, not only to its import, but its admissibility, and, considering the fact to be established, that the suits relative to the bond and mortgage are those to which the agreement must be construed to relate, we are then constrained to say, that it is an agreement which the defendants, as trustees, had no right to make, and we, either as a court of law or equity, are not bound to enforce. If the defendants agreed to indemnify Stainer against the costs, damages, and charges, arising from these suits, out of the property assigned to them, they violated their trust, and, in decreeing the execution of such an agreement, we should violate all the principles by which courts of equity, in judging of such transactions, have hitherto been governed.

The rights of the partnership creditors were fixed by the assignment, and without their knowledge and consent could not be varied by any subsequent act of the partners, or of the trustees. By the terms of the assignment, all the property which it embraced was irrevocably devoted to the ratable satisfaction of the partnership debts; nor without a manifest breach of good faith, and of the trust thus created, could any portion of it be applied, or be rendered applicable to any other purpose. To sustain an agreement involving such a misapplication of the trust property would be to sanction an act, which, according to the doctrine, and in the language of equity, whatever may have been the motives of the parties, must be deemed and declared a fraud.

Sensible of the force of this objection, the learned counsel for the plaintiff endeavored to meet it by requiring us to presume that the indemnity to Stainer which the agreement was meant to secure, was promised to him at the time of the assignment, and was in reality a condition upon which the assignment was made; but it is impossible for us to act upon such a presumption. It is something more than gratuitous and arbitrary. It is not only not justified by any facts that have been given in evidence, but as we read and understand the testimony of Mr. Ellingwood, is positively repelled. As the counsel of Stainer, Dutilh & Co., he drew the assignment, and if a promise of indemnity had then been exacted and given, he must

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have known, and we doubt not would have stated the fact; so far from stating the fact, we understand him as swearing that the indemnity as given was the result not of any previous engagement, but solely of his own recommendation and advice—advice which was certainly not given until many months after the execution of the assignment. For aught that appears in the evidence, there was no thought of an indemnity until the suit in chancery had been commenced.

We are not to be understood as saying, that had the nature of the transaction been proved to be such as the counsel for the plaintiff was forced to assume, our own views as to the justice and law of the case would have been materially altered. We are disposed to think, that a clandestine promise to indemnify Stainer from the proceeds of the property assigned, must still have been regarded by us as fraudulent and void, even had it been shown to be, as between the *immediate* parties, the consideration of the assignment; that question, however, is certainly not before us, and is therefore not necessary to be decided.

Upon the case as it actually is, we are clear in the opinion that the plaintiff is not entitled to the relief which he seeks, even if we adopt that interpretation of the agreement which is most favorable to his claim. We cannot give to the plaintiff, as the assignee of Stainer, any portion of the funds, which, by the joint and irrevocable act of Stainer and his partner, had become the exclusive property of their creditors. The judgment at Special Term is, therefore, reversed, and the complaint dismissed with costs, except the costs of this appeal.

BATES v. STANTON and others.

As a general rule, a bailee cannot set up a right of property in a third person to defeat a recovery by his bailor.

To this general rule, however, there are many exceptions.

Seemle—That the right of the true owner may be set up in all cases where, upon his demand, the property has been in fact delivered to him before the commencement of the suit.

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The law may be considered as settled, that such a delivery is an absolute bar to the claim of the bailor, when it is shown that he had obtained possession of the property by felony, force, or fraud.

Held, that the evidence given by the defendants upon the trial in support of their defence, that the goods in controversy had been obtained from an agent of the owners by collusion and fraud, was properly admitted.

Held also, that the record of a judgment in favor of the owners against the plaintiff for the recovery of the goods, was conclusive evidence of such collusion and fraud, the questions litigated and the parties being substantially the same.

(Before DUEK, PAYNE, and BOSWORTH, J. J.)

Feb. 17; June 12.

THE complaint alleged that the defendants were the owners and master of the ship *Hero*, one of a line of packet ships sailing at stated periods between New York and New Orleans, called "Stanton's Line," for the transportation of freight and merchandise for hire, and that the defendant, Stanton, was the agent of the line, and engaged in receiving and sending freight and merchandise for hire from New York to New Orleans, and forwarding it to St. Louis and other places above and beyond that place.

That on the 3d day of April, 1848, the plaintiff, being the owner of 125 cases of boots and shoes, which he was desirous of sending to St. Louis, with a view of there commencing the boot and shoe business, shipped the same on board said ship for New Orleans, to be forwarded to St. Louis, and took from the master a bill of lading of that date, by which the defendants acknowledged the receipt of said cases of merchandise from the plaintiff on board said ship, and agreed to carry them to New Orleans, and forward them to St. Louis.

That the ship sailed, and arrived at New Orleans on the 23d of April, with the goods on board; that after she sailed, the defendant, Stanton, wrote to the consignee and agent of the ship at New Orleans, in combination with one Jesse Y. Niles, and caused said goods to be returned in said ship on her return voyage to New York, and said property, of the value of \$5,747 29, was by the defendants converted to their own use. The plaintiff demands the amount of the goods and consequential damages, amounting in the whole to \$10,000.

The defendant, Stanton, and the other defendants, in separate answers, made substantially the same defence.

They admit the receipt of the goods on board of the ship, the sailing of the ship, and their refusal to deliver them, and in excuse, say :

That the goods did not belong to the plaintiff, but to Grant & Ensign, of Hartford, Connecticut, who had intrusted them to one Cook, to sell for them in his store in Norwich, Connecticut. That the plaintiff obtained them by a fraudulent combination with Cooke. That being so informed by Niles and Grant & Ensign, the defendants, at their request, caused 124 cases of said property to be returned in the ship to New York, and there delivered to Grant & Ensign, and took their bond of indemnity against the plaintiff's claim, and Grant & Ensign defended this action.

The plaintiff, in reply, controverts the averments in the defendants' answers.

On the trial before Oakley, Ch. J., and a jury, the plaintiff, having produced the bill of lading, the execution of which was admitted, and proved a demand of the goods of the defendants, and a refusal to deliver them before the commencement of the suit, rested his cause.

The defendants then offered in evidence, in defence of the plaintiff's action, a record of the proceedings in a case in the Court of Common Pleas in the State of Massachusetts, where, in an action of trover for one hundred and twenty-five cases of boots and shoes, claimed to be those in question, by Grant & Ensign, against Bates, they recovered a verdict for \$3,534 22 damages, and a judgment thereon, and in which, on exceptions taken to the ruling of the judge, the case was removed to the Supreme Court, and was then pending.

The plaintiff objected to the admission of this testimony on the ground that the defendants could not dispute the plaintiff's title to the property in the bill of lading, that the proceedings were between other parties, and assuming them to be a final judgment, did not conclude the parties to this suit; that the proceedings on their part showed that the judgment was not final, and were not sufficient to estop the plaintiff in this action.

The court decided that the proceedings in the court in Massachusetts were admissible in evidence, and that the defendants

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might dispute the plaintiff's title by showing the title of the goods to be in Grant & Ensign.

The court thereupon decided that said proceedings were conclusive as to the rights of the parties to this action, and precluded the plaintiff from any right to recover for the 125 cases of boots and shoes in the complaint mentioned, or any part of them, and ordered the complaint to be dismissed and judgment to be entered for the defendants.

From this judgment the plaintiff appealed, and the case was now before the court upon a bill of exceptions.

F. B. Cutting and *Asa Child*, for the plaintiff, made and argued the following points—

I. The ship-owners having refused to deliver the goods in pursuance of the bills of lading, were guilty of a conversion.

II. The ship-owners were not compelled by any legal proceedings, or other compulsory means, to surrender the goods to Grant & Ensign; the property was brought from New Orleans by them in violation of their contract as carriers, and was voluntarily delivered to Grant & Ensign. They cannot now set up an adverse title against the shipper who intrusted them with the property. Having obtained possession from the plaintiff, by reason of an express undertaking to deliver them to him or to his assigns, they are estopped from setting up title in strangers. (*Gosling v. Birney*, 6 Bing. 339; *Kiernan v. Sanders*, 6 Ad. and Ellis, 516; *Hall v. Griffin*, 10 Bing. 246; *Miles v. Cattle*, 6 Bing. 734; 1 Bacon Abg. 369, Title Bailment (A). Story on Agency, sec. 217; Angel on Carriers, sec. 335, 217; Story on Bailments, sec. 450, 582; *Discon v. Hammond*, 2 B. and Ald. 313).

The defendants would not have been permitted to file a bill of interpleader (*Cranoshay v. Thornton*, 2 M. and C. 1; S. C., 7 Sim. R. 391; *Nicholson v. Knowles*, 5 Madd. 47; *Lowe v. Richardson*, 3 Madd. 277; *Cooper v. De Pastet*, 1 Tam. R. 177; 2 Sto. Eq. Juris., § 816, 817, 812).

III. The proceedings in the Court of Common Pleas for Hampden County were not admissible evidence against the plaintiff; because,

1. As between the parties to this action, the proceedings would not have been evidence against the defendants (1 Greenl. Ev. § 524).

2. The papers showed that there had been no final judgment (1 Greenleaf, 529).

IV. But if admissible, the alleged proceedings were not conclusive against the plaintiff.

Dan'l Lord, H. G. De Forest, and John A. Weeks, for defendants, made and argued the following points—

The defendants claim to set up the lawful title of Messrs. Grant and Ensign, from whom the goods in question were fraudulently taken by the plaintiffs; Grant & Ensign having demanded the goods, and having indemnified the defendants against the plaintiffs' claim.

As to the defendants' right to set up the title of Grant & Ensign—

I. It is competent for the carrier to set up the rightful title of the true owner, from whom the possession has been fraudulently taken by the bailor, after notice by the true owner of his superior title.

1. If the carrier delivered the goods to the bailor, after notice from the true owner, he does so at his peril (Story on Bailments, 4th ed. § 102; *Wilson v. Anderton*, 1 Barn. and Adol. 450; *Ogle v. Atkinson*, 5 Taunt. 759; *Taylor v. Plumer*, 3 M. and Selw. 562; *Hardman v. Wilcock*, 9 Bingham, 382).

2. The bailor cannot improve his title by a mere delivery to the carrier, and if his possession be *originally* tortious, it must remain so (Story on Bailments, § 281; *Wilson v. Anderton*, 1 Barn. and Adol. 450).

3. There is no valid distinction, as related to the present case, between a *tortious* and a *felonious* taking by the bailor. As the *felony* must avoid the possession even of a *bonâ fide* purchaser, so the fraudulent taking can pass no title by the mere deposit with the carrier.

4. It is the basis of the contract between the parties, that the bailor is lawfully possessed of the goods; and the innocent carrier should not be made to suffer by means of the bailor's

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fraudulent misrepresentations, or concealment of his wrongful title.

5. The policy of the general rule, as to setting up the *jus tertii*, is not impaired by the allowance of these exceptions to it, and on authority and principle they must be admitted (*Shelbury v. Scotsford*, Yelv. 23; Angell on Carriers, p. 336, and cases cited; see especially *King v. Richards*, 6 Whart. Penn. Rep. 418; *Hardman v. Wilcock*, 9 Bingham, 378).

6. A bill of interpleader is not the proper remedy of the defendants in the present case, because the plaintiff and Messrs. Grant & Ensign claim under independent and inconsistent titles.

As to the effect of the judgment record—

II. The judgment record, produced in evidence, is complete in itself as a final judgment, notwithstanding the writ of error pending at the time of the trial of this cause (Mass. Rev. Stat. chap. 82, § 6, § 12.)

III. If the record was insufficient, it is enough that the defendants produce, upon this hearing, a new exemplification, showing that the judgment is now complete and final.

IV. The judgment in favor of Grant & Ensign, in the Massachusetts suit, is conclusive against the title of the plaintiff to the goods in question; and conclusive as to his fraudulent taking of them: the judgment need not be specially pleaded (*Miller v. Maurice*, 6 Hill, 114).

1. The judgment relates to the identical subject matter of this suit, and the issue was upon the fraudulent taking of the goods by Bates: this appears by an inspection of the judgment record.

2. The defendants are the *privies* of Grant & Ensign, and defend this suit simply as their representatives, under their title and upon their indemnity (1 Greenleaf's Evidence, § 523).

3. If the plaintiff be allowed to recover in this action, Grant & Ensign will then be held liable to the defendants, under this indemnity; and thus, in spite of the Massachusetts judgment, they will be compelled to pay, for the benefit of Bates, the value of the very goods adjudged to have been fraudulently taken from them by him.

By THE COURT. DUER, J.—That a bailee cannot, in ordinary

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cases, dispute the title of his bailor, no more than a tenant that of his landlord, is familiar law, but we have not been able to discover that the rule applies with greater stringency to the relation between a common carrier and a shipper, than to any other form or species of bailment. The bill of lading, it is true, contains an admission of the ownership of the goods, and it contains also an admission of their actual shipment and of their sound condition. It appears, however, to be settled, that in neither of these cases does the admission operate as an estoppel. It is strong *prima facie* evidence of the truth of the facts to which it relates, but not conclusive (*Berkely v. Watling*, 7 Adol. and Ell. 29; *Barret v. Rogers*, 7 Mass. 297; *Maryland Ins. Co. v. Ruden*, 6 Cranch, 338).

The present case, therefore, stands upon the same ground as other bailments, in respect to which the general rule undoubtedly is, that in an action by the bailor, a *jus tertii*, a right of property in a third person, cannot be set up by the bailee to defeat a recovery. But to this general rule there are many exceptions. The defendant in such a suit may doubtless show that the property had been taken from him by process of law, or by a person having a paramount title, or that the title of the bailor had terminated, or that he, the bailor, was himself a mere agent, and that the return of the property to him had been forbidden by his principal (*Shelby v. Scotsford*, Yelv. 23; *Edson v. Weston*, 6 Cranch, 278; *Ogle v. Atherson*, 5 Taunt. 758; *Watson v. Anderton*, 1 Barn. and Ald., 450; *Whittier v. Smith*, 11 Mass. 211; Story on Bail. § 120, 266). Nor are these the only exceptions; we are strongly disposed to think that the right of the true owner may be set up, in all cases, where upon his demand, the property has been in fact delivered to him before the commencement of the suit, and are satisfied that such a delivery is an absolute bar, where it appears that the plaintiff had obtained possession of the property feloniously or tortiously, by felony, force, or fraud (*Hardman v. Wilcock*, 9 Bing. 382-4; *King v. Richards*, 6 Whart. Penn. R. 418; Story on Bail. § 582; Angell on Carriers, § 336). In *Hardman v. Wilcock*, this doctrine was expressly and with great decision, affirmed by two of the most eminent judges of the present day, Justices Alderson and Patterson, and was held to be entirely reconci-

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lable with all the prior authorities, including most of those on which the plaintiff's counsel in the present case has relied.

In *King v. Richards*, a case bearing a close analogy to the present, the same doctrine, nearly in the terms in which we have stated it, was made by the Supreme Court of Pennsylvania the ground of its decision, and was even applied to defeat the claim of an innocent plaintiff to whom a bill of lading of the goods in controversy had been assigned for value by the fraudulent shipper. In this last case Mr. Justice Kennedy, as the organ of the court, delivered an elaborate and able opinion, in which he reviews with acute discrimination all the English cases, and sustains the conclusion at which he arrives by reasons of unanswerable force; reasons that commend themselves alike to the judgment and the conscience. We cannot at all hesitate to follow those decisions. It would be a serious reproach to the administration of justice, if the principle which they sanction—a principle not only of sound policy but of sound and obvious morality—were not felt and acknowledged to be the law. No one can doubt that he to whom stolen goods have been delivered, is bound to return them to the true owner when satisfied by due proof of the justice of his claim, and when the fraud is established by similar proof the moral obligation is exactly the same.

It would be a shock to the most ordinary sense of justice to permit the thief or the swindler, in such cases, to recover in a subsequent suit the value of the goods from the honest bailee. The rule which forbids a bailee to deny the title of his bailor, confined within its proper limits, is wise and salutary; but if no exceptions are to be allowed, it would deserve to be condemned, in numerous cases, as arbitrary and unjust; confined within its proper limits, it inculcates and enforces the observance of good faith; carried beyond these limits, it would be an encouragement and a protection to injustice, violence, and fraud.

The defence, therefore, which is set forth in the answers in this case, was justly held upon the trial to be valid in law, and the only question that remains is, whether the truth of this defence was conclusively established by the record of the judgment which was given in evidence. The Chief Justice so decided, and we are satisfied, upon full consideration, that his

decision, although not resting upon the authority of any case exactly similar in its circumstances, is sound in its principle, and as such must be sustained. It is true that a prior judgment is only conclusive when it appears that the same questions were litigated and determined in the suit in which it was rendered, and it may also be admitted that it is only conclusive between parties and privies, and that the estoppel which it raises must be mutual in its operation. But if we mistake not, all these necessary conditions are fulfilled in the case before us.

The action of trover in which the judgment was rendered, related to the very goods now in controversy; the plaintiffs were Grant & Ensign, to whom, as owners, the goods have been delivered by the defendants, and the plaintiff here was the sole defendant. The plaintiffs claimed to recover upon the grounds that they were the true owners of the goods at the very time they were shipped, and that the defendant had obtained the possession from their agent by collusion and fraud. The defendant denied their ownership, and asserted his own title as a purchaser in good faith and for full value from a person having the right to sell. The questions, therefore, of ownership and of fraud were directly at issue, and unless they had been determined in favor of the plaintiffs, they could not have obtained the judgment that was rendered. Exactly the same questions are raised by the pleadings in this case, and if this suit is substantially a suit between the same parties, or a privity has been shown to exist between the defendants and Grant & Ensign, it is impossible to deny that the judgment then rendered must be regarded as conclusive.

It is a mistake to suppose that the term parties, in the sense of the rule which renders a prior judgment conclusive upon those who sustain that character, is restricted to those who are parties upon the record. On the contrary, it includes all who have a direct interest in the subject matter of the suit; a right to make a defence, or control the proceedings (1 Greenleaf on Evid., p. 523; Smith's Lead. Cases; *Duchess of Kingston's case*, 20 Howell State Trials, 538; *Morgan v. Thorn*, 9 Dowl. 228). Grant & Ensign were parties upon the record as well as in interest in the trover suit, and in this, although not parties upon the record, they are certainly parties in interest. It

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appears from the pleadings—for the allegations in the answers to that effect are not denied in the replies—that they have given to the defendants a satisfactory indemnity, and that upon the faith of that indemnity, the goods were surrendered and this suit is defended.

It is for them, therefore, that this defence is made; they have a direct interest in the result of the suit, and in consequence of that interest, have acquired a right to control its proceedings. We are therefore justified in saying that it is by them that this suit is in fact defended, and that they as parties have set up as against the plaintiff the same title which in the former suit they succeeded in establishing against him. The controversy is the same, and substantially the parties, and the prior judgment therefore conclusive.

Even were it granted that those only are to be deemed parties, in the sense of the rule, who are parties upon the record, it is certain that the indemnity which Grant & Ensign have given has created a privity between them and the defendants which authorizes and indeed renders it the duty of the defendants to set up, for their protection, the former judgment as a bar to the plaintiff's recovery. It is said by Mr. Greenleaf, and our Supreme Court, in the case of *Rapelye v. Bruce* (4 Hill, 19), has so decided, that he who covenants for the results or consequences of a suit between others (and the indemnity here given is equivalent to such a covenant), by that act connects himself in privity with the proceedings so as to render the record of the judgment in that suit conclusive evidence against him (1 Greenleaf, p. 692, § 523). If Grant & Ensign, therefore, would be concluded by a judgment in favor of the plaintiff in this suit, that is, estopped from denying him to be the true owner of the goods in controversy, it would be most unreasonable to hold that they may not be aided by the defendants in barring his recovery, by setting up a former judgment, which concludes him from denying their title. There ought not to be two judgments directly in conflict upon the same question, and that conflict is only to be prevented by preventing the plaintiff from controverting the judgment that has been obtained against him.

The objection upon which the counsel for the plaintiff seemed

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greatly to rely, that the record of the proceedings in the former suit, had an opposite judgment been rendered, would not have been evidence against the defendants, has been answered by the observations already made. Such a record would have been conclusive evidence against the defendants upon the questions decided, exactly for the same reasons that the plaintiff is concluded by the record now produced. The defendants would be concluded by the privity that has been shown to exist between them and Grant & Ensign. It was admitted upon the argument that the judgment against the plaintiff has been affirmed upon a writ of error, and the objection, therefore, that the record produced did not show the judgment to be final, if not meant to be abandoned, must be considered as overruled.

For the reasons that have now been given, without entering upon other questions which our examination of the pleadings has suggested, the exceptions stated in the case to the ruling and charge of the Chief Justice are overruled, and the motion for a new trial denied with costs.

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Before the Revised Statutes it was settled that the auctioneer, in public sales of property, was the agent of the buyer and seller, and the Revised Statutes (2 R. S. 135, § 8, 9), which require the note or memorandum of a contract of sale, to be subscribed by the party making it, or his authorized agent, is sufficiently complied with, when the entry by the auctioneer of the sale, in which the name of the principal appears, is signed by the auctioneer with his own name, without any reference to his character as agent. The intention to bind him, and not the auctioneer, is plain, and makes it the contract of the principal.

The rule of law, which requires an agent to sign the name of his principal, in the execution of instruments, is confined to writings under seal.

An auctioneer, upon the sale of real estate, made an entry in his book of sales of the name of the seller of the property, and in connexion therewith a description of the property, which consisted of five lots, which were sold at the sale to different purchasers, and the entries of which were made thereunder, in the following manner: "1 lot, corner of Avenue A, to W. J. \$2,010," underneath which were entries of the sales of three lots immediately adjoining, and then the following: "1 lot, next adjoining, J. L. P., \$1,850." *Held*, that the entry, in the position

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and connexion which it occupied in the sales book, signified that J. L. P. had become the purchaser of that lot, and sufficiently indicated that he was the highest bidder, and that the same was struck off to him.

Held also, that, taken in connexion with the description of the property contained in the entry of sales, it was a sufficient identification of the lot sold.

A mis-description in the first name of the seller does not invalidate the contract of sale.

The powers of an auctioneer are limited and special. But where the terms of sale provided that ten per cent. of the purchase money should be paid on the day of sale,

Held, that the auctioneer's authority was not limited to receiving it on that day, unless previously prohibited by the seller.

As a general rule, time is not so essential in executory contracts for the sale of land as to work a forfeiture on the omission to pay at the day stipulated. And until the seller does some act to make it essential, the buyer is at liberty to pay after that day.

(Before SANDFORD, DUER, and BOSWORTH, J.J.)

April 21; June 26.

THIS was an action brought by the plaintiff to enforce specific performance of an agreement for the sale of real estate.

The complaint alleged, that on the 12th of March, 1851, the defendant caused a certain lot of ground belonging to him, situated on St. Mark's Place, in the city of New York, and described in the complaint, to be offered for sale at public auction. That the same was subsequently struck off to the plaintiff, he being the highest bidder, and that the plaintiff, having complied with the terms of sale, had demanded a deed from the defendant, which was refused. The complaint prayed that the defendant might be compelled to execute a deed. The answer of the defendant denied that the auctioneer, as the agent of both parties, signed the memorandum of sale; or that the plaintiff paid to the auctioneer the ten per cent. upon the said purchase required by the terms of sale, and alleged that if paid, it was not until after the said sale, and when the auctioneer had been forbidden by the defendant to receive the same, and that the conditions of sale in this respect, if varied by the auctioneer, were varied without the authority of the defendant. The reply admitted that the ten per cent. was not paid on the day of sale, but alleged that the plaintiff was ready then to pay it, and that the defendant ratified the auctioneer's subsequent reception of it.

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The cause was referred, by consent, to M. Ullshoeffter, Esq. It appeared in evidence before the referee, upon the trial of the action, by the testimony of Mr. Bleecker, the auctioneer, that he sold five lots in St. Mark's Place between Avenue A and ———— for the defendant on the 12th of March, 1851, upon a previous employment by the defendant for that purpose; that the lot in question was one of the five lots so sold. The terms of sale were, ten per cent. to be paid on the day of sale, with the auctioneer's fees; \$1,000 to remain on bond and mortgage, and the balance of the purchase money to be paid in fifteen days, when warranty deed should be given. The entry in the sales book of the said auctioneer was here produced in evidence, and was as follows, under the date of March 12th, 1851, namely: First, the name of "John Hagadorn, Esquire," written at the side of the left page—immediately thereunder on the same is written, "terms of sale," and immediately under "terms of sale," are written, "ten per cent. on the day of sale with auctioneer's fees—one thousand dollars can remain on bond and mortgage on each lot at the option of the purchaser, the balance to be paid in fifteen days, when warrantee deed will be given." That in the centre of said page, a little to the right of the aforesaid entry, there is wafered to said page a small slip cut from a paper, and which reads as follows:—"On St. Mark's Place, Avenue A, five valuable building lots, situated on and next the northwest corner of St. Mark's Place and Avenue A, all fronting on St. Mark's Place—said lots are each in size from 22 feet 6 inches to 23 feet, front and rear, by 54 feet. For particulars apply to the auctioneer, No. 7 Broad street." On the page on the right of said book, and opposite the aforesaid entries, under the words, "building lots on St. Mark's Place, N. W. corner of Avenue A," are the entries following (written in lead pencil):

1 Lot cor. of Av. A,	Wm. Irwin,	\$2,010
1 Lot next adjoining,	I. L. Pinckney,	1,410
1 Lot next adjoining,	Irwin,	1,355
1 Lot next adjoining,	Mr. Irwin,	1,350
1 Lot next adjoining,	I. L. Pinckney,	1,350
		<hr/> 7,475

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Witness received auctioneer's fee and the 10 per cent.; received the 10 per cent. on the 15th of March, 1851. Witness gave a receipt for the 10 per cent. The receipt, being produced and proved by the witness, was in the words following:

"\$135.

New York, March 15, 1851.

"Received from I. L. Pinckney 135 dollars, being 10 per cent. deposit, according to the conditions of sale, upon his purchase of lot in St. Mark's Place, sold him the 12th day of March, 1851, at auction, for \$1350, for which a good and sufficient title is to be given by John Hagadorn and others.

A. L. BLEECKER, Auctioneer, by A. L. B.

Received no countermand not to receive the ten per cent. before he had received it. Did not know as he ever received any countermand. After the sale the defendant came into witness's office, and wanted to pay his bill and close his account—cannot identify the time, but presume it was March 28, 1851. Recollected that the defendant came into witness's office and inquired of Mr. Baker whether or not the 10 per cent. had been paid, and understanding that it had not, the defendant objected. Thought this was after the 10 per cent. had been received. Two lots were struck off to the plaintiff at said sale, one of which a Mr. Irwin afterwards took.

William C. R. English was next sworn, and testified that on the 7th of April, 1851, at plaintiff's request, and with the plaintiff, he tendered to the defendant a deed of the lot in question, a bond and mortgage of the said lot for \$1000, and \$220, with the receipt for the 10 per cent., amounting to \$355, which papers were admitted as proper and sufficient; but the defendant would not execute the deed, or take the money.

The plaintiff here rested, and the defendant's counsel moved for a nonsuit, on the ground that the auctioneer was a special agent, and was bound to pursue his instructions, and that in this light the plaintiff had not made out his case. The referee denied the motion, and the defendant's counsel excepted. Various conflicting testimony was then offered upon both sides, upon the point, whether the auctioneer had been forbidden by the defendant to receive the 10 per cent. prior to its actual payment by the plaintiff.

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The referee reported in favor of the plaintiff, and concluded his report as follows :—

“ My opinion upon the delay by the plaintiff in making the payment until three days after the sale, but within the fifteen days fixed for the completion of the purchase, such payment being received by the auctioneer as a compliance with the terms of sale, is that it did not rescind the contract, but was a sufficient payment, and that it left the contract binding on both parties. I likewise conclude that the auctioneer, under the circumstances, had authority to receive the money when it was paid to him, and that the plaintiff paid the money without any notice from the defendant of any objection thereto, and that the auctioneer received such money without being notified by the defendant not to receive it. There is some difficulty in regard to the testimony, which is conflicting on the point of notice to the auctioneer, but the weight of the proof leads me to the conclusion that there was no revocation of the auctioneer's power to receive the money, nor was the auctioneer notified of the defendant's dissent until after the money was received. I can see no other mode of reconciling the testimony than by supposing that the language used by the defendant's son to the auctioneer was not at as early a time as he thinks, and was not expressed so as to be understood as communicating a clear rescission of the contract: and this is the result of my examination of the testimony. No award has been proved to affect this action in any respect. A warranty deed was to be given by the terms of the sale. The auctioneer's receipt says that a good and sufficient title is to be given. I rather think that under the terms of sale the vendee could not be compelled to complete the purchase unless a good and sufficient title is given; but this point is not material, because the plaintiff was willing to take the defendant's warranty deeds and offered to complete the purchase, and did make the requisite tender and offer.”

The defendant moved to set aside the report.

Mr. J. O. Robinson, for appellant, argued the following points :

I. The memorandum required by the statute is one which,

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without any extraneous proof, shows that something, and what, has been bought and sold for a certain price, and between certain parties. (16 Wend. 28-31; *Baptist Church v. Bigelow*, 12 John. R. 102; *Merritt v. Clason*, 14 Id. 486; 3 John. R. 399, 419; *Bailey v. Ogden*.) In this case it does not appear from the memorandum in the sales book, that the lot in question was struck off, or contracted to be sold to, the plaintiff, nor does it sufficiently specify the lot sold, nor by whom. (Paley on Agency, 170.)

II. The auctioneer had no authority to extend the time for the payment of the "10 per cent.," or to receive it, or give a receipt for it on the 15th of March. (2d Kent's Com. 792 & 793 (7th Ed.) 2 Ed. 537, and authorities there cited.) The law will never construe it to have been the intention of the principal to allow the agent to exceed the authority given to him, when it is to his disadvantage. (Story on Agency, § 172, and authorities there cited; 2 John. R. 48, *Batty v. Carswell*; 2 Kent's Com. 617-619 (4th Ed.); 1 John. Ch. 375, *Benedict v. Lynch*, 1 Sugd. 56-27, § 7. Paley on Agency, 170-70.)

III. The time was material. (1 John. Ch. 375; 2 Barb. 280; 2 Story Eq. § 780.)

IV. The weight of evidence was clearly contrary to the conclusions of the referee, and the defendant deems it established by the evidence in the case: 1. That the 10 per cent. was not paid at the time specified in the terms of sale, but in three days thereafter, and probably longer. 2. That the plaintiff was again in default in not paying or offering the balance of the purchase money within the fifteen days fixed for the completion of the sale. 3. That the referee erred in finding that the plaintiff completed his contract within the fifteen days. 4. Also in finding contrary to the evidence that no notice was given to the auctioneer that the defendant did not consider himself bound by the sale. 5. That the testimony of Hagadorn in that respect stands uncontradicted. 6. The referee also erred in supposing that the testimony was conflicting upon the point of notice to the auctioneer, and also in concluding that there was no revocation of the auctioneer's power to receive the money, and that the auctioneer was not notified of the defendant's dissent until after the money was received. Also

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in supposing that the only mode of reconciling the testimony was to construe the language of Hagadorn (witness) as he has in that respect.

V. In this case the auctioneer was a special agent of the defendant, and the acts of a special agent do not bind the principal unless strictly within the authority conferred. (2 Kent's Com., 792–793 (7th Ed.), and authorities there cited. *Rossiter v. Rossiter*, 8 Wend. 494; *Batty v. Carswell*, 2 John. R. 48.)

VI. An auctioneer is considered as a special agent for the purpose of sale, and as soon as the sale is complete his agency ends. (Paley on Agency, p. 170.)

VII. A plaintiff seeking a specific performance, must show himself without fault, or fully excuse any default on his part. (1 John. Ch. 375–9; *Campbell v. Harrison*, 3 Litt. 292; *Bank of Columbia v. Hagner*, 1 Peters. 464; *Colson v. Thompson*, 2 Wheaton, 336; *Id.* 299; *Harvey v. Banks*, 1 Randolph, 408, 2 Desauss. 590. 1 do. 382.) Upon the ground that he who seeks equity, must himself do equity. (1 Desauss. 163; 2 Wheat. 2 Story Eq. § 780.) The plaintiff also made default in not paying, or offering the balance of the purchase money, exclusive of the 10 per cent., and one thousand dollars in 15 days after the sale, pursuant to the terms thereof. And as the complaint does not allege such payment or offer, it does not state facts sufficient to constitute a cause of action.

Mr. W. C. R. English, for the plaintiff, said—

There was one question of fact. Did Hagadorn direct the auctioneer not to complete the sale? The referee found in the negative. By that finding the court is concluded. There were two questions of law. Had the auctioneer any right to receive the ten per cent. after the day of sale? Is the vendor discharged if the vendee fail on the very day to pay the ten per cent?

Both these points the referee decided correctly.

BY THE COURT. SANDFORD, J.—The defendant resists a specific performance of this agreement on various grounds. We will consider, first, the objections made upon the statute of frauds.

Before the revised statutes it was settled that the auctioneer,

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in these public sales, is the agent of both the buyer and the seller, and that his entry of the name of the purchaser in his sales book, immediately on striking off the property to him, was a sufficient signing of the contract to bind the purchaser. (*McComb v. Wright*, 4 J. C. R. 659; *Emerson v. Healis*, 2 Taunt. 38; *Rennys v. Proctor*, 3 Ves. and B. 57; *First Baptist Church v. Bigelow*, 16 Wend. 28.)

The revised statutes require the note or memorandum of the contract to be subscribed by the party making the sale, or his authorized agent. (2 R. S. 135, 8, 9, *Champlin v. Parish*, 11 Paige, 405.) Here the entry is subscribed by the auctioneer with his own name, without any reference to his character as agent. Does that suffice within the meaning of the statute?

In our opinion it is sufficient. The rule of law which requires an agent to sign the name of his principal in the execution of instruments, is confined to writings under seal. (*Evans v. Wells*, 22 Wend. 324; *Townsend v. Corning*, 23 *ibid.* 435; *Townsend v. Hubbard*, 4 Hill, 351.)

The auctioneer's entry in this instance furnishes the name of his principal, and although that name does not appear in the subscription, the intention to bind him and not the auctioneer personally, is perfectly plain, and makes it the contract of the principal.

Several objections are next made upon the entry itself. It is not denied that the entry contains the price of the property and the terms and times of payment, but it is contended that it does not show by whom the lot is sold, nor what particular lot is sold, nor that it was struck off or contracted to the plaintiff.

As to the last objection, the entry "1 lot next adjoining, I. L. Pinckney, \$1350," in the position and connexion which it occupies in the sales book, signifies that I. L. Pinckney had become the purchaser of that lot. It is true, there is no word used which expresses in direct terms that he was the highest bidder, or that it was struck off to him, or that he had contracted to buy the lot. But all this is fully signified by what is entered upon the book. The entries can have no other meaning. The use of initials in the entry of the plaintiff's name does not impair the validity of the writing. It is not denied that the plaintiff is the person intended and the person to whom

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the lot was struck off, nor is it even alleged that there is any other Pinckney who has the same initial letters of his Christian name. We therefore think there is no force in the objection that the sales book does not show the plaintiff to have been the purchaser.

Next, as to the point that it does not show what particular lot was sold to him. This is founded upon an alleged omission in the description of the lot. The whole entry, taken together, discloses that the plaintiff bought a lot fronting on St. Mark's Place, on the south, being the fifth lot from Avenue A (the intervening four lots appearing in the same entry), from 22 feet 6 inches to 23 feet front and rear, and 54 feet deep. The description, we think, is ample to identify and bound the lot sold, as one 22 feet 6 inches wide. Beyond that, the plaintiff could not, perhaps, claim a conveyance under the description, but to the lot of that width we think there is no difficulty in sustaining his claim, and he claims no more in his complaint.

The remaining objection is, that the entry does not give the name of the seller. In our opinion, there is enough proved, in connexion with the surname, to identify the person contracting, and that it is a case of misdescription of the Christian name. The land sold is described in the writing. It is conceded that William Hagadorn was the owner of the land, and employed the auctioneer to sell it. Rejecting the erroneous word "John," there is sufficient remaining upon the face of the auctioneer's entry, in the name "Hagadorn," and the description of the property he proposed to sell, to demonstrate the party intending to contract. The parol evidence, therefore, becomes evidence of identity of the person. The seller, "Hagadorn," is ascertained by the entry, his identity is shown by the conceded facts before mentioned, and the inapt or false designation "John" does not vitiate the contract. This is upon the maxim, "*falsa demonstratio non nocet*;" for illustration of which we refer to *Jackson, ex dem. Dickson v. Stanley*, 10 John. 133; *Jackson, ex dem. Miner v. Boneham*, 15 *ibid.* 226; and 2 Cow. & Hill's Notes to Phill. Ev. 1368 to 1375.

The defendant's next point is, that the auctioneer was an agent, with limited power, and had no authority to extend the

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time for the payment of the ten per cent., nor to receive it, or give a receipt for it three days after the sale.

The power of an auctioneer is, no doubt, special and limited. His authority to receive the stipulated deposit, which in this case was ten per cent., is not, nor could it be questioned. He receives the deposit not merely as the agent of the seller: he is bound to keep it for the indemnity of the purchaser, until the latter is enabled to look into the title proposed to be conveyed to him, and decide on its sufficiency, or until the lapse of the time limited for the purpose in fixing the day for the payment and security of the residue of the price.

The terms of sale in this case, as is customary, provided that the purchaser should pay ten per cent. on the day of sale. Was the auctioneer's authority limited to receiving it on that very day? His entry in his sales book had made a complete contract, by which the purchaser was bound, at all events, to take the lot at the price there set down. The seller had a right, undoubtedly, to make time of the essence of the contract, if he chose to do so. As a general rule, time is not so essential in executory contracts for the sale of land as to work a forfeiture on the omission to pay at the day stipulated (*Edgerton v. Peckham*, 11 Paige, 352, 363), and until the seller does some positive act to make it essential, the buyer is at liberty to pay after the day. We find no warrant for the doctrine that the auctioneer's authority to receive the deposit on a sale made by him, on the terms here expressed, "ten per cent. on the day of sale," is limited to receiving it on that day and on that day alone. Until notified to the contrary by the seller, and his authority to receive it thereby revoked, we see no good reason why it does not continue after the day of sale. We do not perceive that it differs in this respect from the authority of other agents empowered to receive money on the sales of land or other executory contracts. It is a very common occurrence that executory contracts are made for the sale of lands, and left in the hands of agents to receive payment. They provide for payment on fixed days, and almost universally they make the execution of a conveyance dependent upon the payment of the price at the times and in the manner stipulated. We venture to say it

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was never heard of that the principal in such contracts could refuse to convey because the agent had received a payment after the day stipulated, there having been no notice to him not to receive it, or other revocation of his authority.

The power of an auctioneer, in receiving the ten per cent., does not fall short of that of such agents for the collection of contracts made on private sales, and we think we are holding the rule quite strict enough in favor of sellers at auction, when we decide that, until notified by the seller after the day of sale that he repudiates the contract and revokes the auctioneer's authority to receive the deposit, that authority continues in full force.

The stipulation for the payment of a per centage, by way of deposit, on the day of sale, is for the benefit of both the buyer and seller. The buyer, by complying with those terms literally, will put it out of the seller's power to revoke the sale on the ensuing day by recalling the auctioneer's authority to receive the deposit. If the buyer postpone the payment of the deposit till the next or a subsequent day, he does it at the peril of that contingency. The seller may in the meantime forbid the auctioneer to receive the deposit, and on a tender of it to himself personally, he may refuse it, on the ground that he was entitled to have it received by the auctioneer on the day of sale. But we cannot hold that the auctioneer's authority to receive it terminates absolutely on the day of sale, nor that it differs in this respect from the power of other agents authorized to receive money payable at a fixed day.

The convenience of business, a circumstance which courts should always regard where no principle of law interferes, seems to require an authority in the auctioneer even more extended than that we have expressed. The quantity of real estate sold at public auction in this city is immense. A great many parcels are sold by one auctioneer in a single day: and when, as the fact sometimes occurs, he sells a hundred or more distinct parcels at a single sale, it is manifestly impracticable that all or even a major part of the purchasers can pay their deposit to him on the day of sale. The convenience of all concerned in this great and increasing department of business would be subserved by holding that each purchaser may pay his deposit in

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twenty-four hours after the sale. When judicial sales are made, there is a propriety in requiring an immediate deposit, so as to preclude sham bids made for the sake of delay.

Whether the principles of law will authorize the latitude we have suggested, we need not now decide. We are very clear, however, that they do warrant us in deciding, that until prohibited by the seller, the auctioneer's authority to receive the deposit continues after the day of sale. Its limit would probably be the time fixed for the completion of the purchase, for if the buyer neglect to pay the deposit after that period, the purchase may be deemed abandoned, and the auctioneer's authority to act for the seller thereby terminated. There was no such lapse of time in this case as would impair his authority to receive the deposit.

The only remaining question is then presented — Did the defendant revoke the auctioneer's authority before he received the deposit? This was a point to be determined on the evidence. The defendant's son testified positively that he notified the auctioneer, the day after the sale, not to receive the ten per cent. There is, on the other hand, strong negative testimony to show that the young man was mistaken as to the time when this notice was given. The referee had the advantage of seeing the witnesses, and observing their respective candor and intelligence, and we ought to be governed by that consideration where there is not a very decided preponderance of testimony against his conclusion. Forming our opinion on the printed testimony alone, we should probably have decided that the notice was given the day after the sale, but the preponderance in that direction is not so great as to justify us in overruling the report of the referee made with the advantage of the personal examination of the witnesses: and as he has decided that the notice was not given till after the payment of the deposit, the motion to set aside his report must be denied, and the judgment must be affirmed.

ROBERT H. M'CURDY and others v. JAMES M. BROWN and HENRY HICKS.

The action for the delivery of personal property under the Code is substantially the former action of replevin.

Hence the plaintiff can only recover upon a legal title—he must show an absolute or special property giving him an immediate right to the possession.

To constitute a lien creating a legal title actual possession of the property is indispensable.

A person who advances money upon the faith that the proceeds of goods which remain in the possession of the owner will be applied to his reimbursement, although he may thereby acquire an equitable lien, has not a legal title to the possession of the goods, and cannot therefore maintain an action for their delivery.

When the title of the plaintiff in such an action is denied by the answer, the defendant is not bound to prove the title set up in his answer, until that of the plaintiff has been established.

If, from the defect of proof, the complaint is dismissed, the defendant is entitled to a judgment for the value of the goods.

Exceptions overruled, and judgment dismissing the complaint affirmed with costs.
(Before DUEK, CAMPBELL, and PARR, J.J.)

May 14; June 26, 1852.

THIS was an action to compel the delivery of forty-nine bales of cotton and woollen cloths of the value of \$3706 52. The sheriff had delivered possession to the plaintiff upon the usual affidavit and undertaking.

The cause was tried on the 24th March, 1852, before Mr. Justice Bosworth, who, upon the motion of the defendants, dismissed the complaint, and ordered judgment against the plaintiffs for the value of the goods in question.

The plaintiffs appealed from this judgment, and the cause was now before the court upon the record and a bill of exceptions.

The pleadings were in the usual form: the plaintiffs averring that they were entitled to the immediate possession of the goods in question, which they had demanded from the defendants, who had refused to deliver them, and claiming judgment for such delivery with damages; and the defendants denying the right of the plaintiffs, averring ownership in themselves, and claiming judgment for a return of the goods, or their value, with costs.

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The bill of exceptions sets forth that the plaintiffs, upon the trial, in order to maintain and prove the issues upon their part, called as a witness,

HENRY G. THOMPSON, who, being duly sworn, testified as follows: I was one of the firm of Thompson & Company, of this city, and remember the sheriff's taking the goods in question in this action, under the process in the same; the goods were what are commonly called Georgia Plains, and there were forty-nine bales of them. The assignees of Thompson & Co. then had the store, the defendants. I was in the store as their agent, and had charge of these goods as such: Thompson & Co. had previously stopped payment; they stopped the twentieth of September last; the goods in question had been in the store, some since May last, some since June last, some since July last, some since August last, and some had been brought in the same month in which they were taken by the sheriff.

The plaintiffs had sold under the arrangement between them and us, and we had delivered, pursuant to their order, a large amount of similar goods; we had delivered all they had sold; what goods they sold were retained by us, until we were ordered by them to deliver the same; they gave us their own notes for the goods they sold; they had sold about twenty-five thousand dollars' worth of plains before we had any paper from them; they then gave us their own notes to a certain amount on account. They sold the goods on commission, and gave us their own notes on account, as we asked for them; I think the thirteenth of September was the first time they were in advance to us.

My father, Orrin Thompson, transacted the business with the plaintiffs for us; he was not a member of our firm, but was authorized to do so.

The goods in question in this suit were in our store, No. 8 and 10 Spruce street, at the time they were taken by the sheriff; we had been in that store since about 1849; the store passed to the assignees on the twentieth or twenty-second of September last; no change was made in the exterior of the store up to the time the goods were taken; our name continued upon the door, and the assignees' name was not up.

The plaintiffs' counsel next called as a witness on their part,

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ORRIN THOMPSON, who, being duly sworn, testified as follows: I was formerly a member of the firm of Thompson and Company, but ceased to be such several years since; after I left the firm, I still exercised a supervision over its business.

In the year 1850, the plaintiffs spoke to us about selling this kind of goods, the Georgia Plains; the year before that, we had sold all we made to a house in Boston, and had declined making for any other party, except upon orders; about November or December, 1850, I told the plaintiffs that if they could sell about eight hundred bales of the goods in this market, we would supply them; they said it was too early then to be able to tell how many they could sell. In January or February of the next year, Mr. M'Curdy told me he had seen the jobbers, and they had engaged about 400 bales; soon after this, the failure of Austens & Spicer put a damper on the market, and he told me he could not engage to sell more that season; we were to deliver about one third of that quantity in the first half of each of the months of July, August, and September; these goods were made at Tariffville, and are of three or four kinds, called copperas, black and white, and sheep's grey of two shades; we made and were ready to deliver our quota for July and August, in all about \$35,000 worth, and in August the plaintiffs advanced us \$25,000 in their own notes; they were to sell at six months, and to guarantee, and were to have a commission of either 5 or 6 per cent., without any further charge; in September they advanced \$25,000 more, which brought us in debt to them.

I requested plaintiffs to furnish us with a memorandum of the kinds and quantities wanted, that we might deliver them; we could not deliver them without such a memorandum, because they had been hypothecated, with liberty to substitute others for any we wished to dispose of; my anxiety to deliver arose from a fear that the jobbers would back out from their engagements, as the goods were dull.

It was our understanding with the plaintiffs that we should not ourselves sell any of this kind of goods in this market until after October, and this quantity was all that was to be offered here; we never told them the goods were hypothecated.

Being cross-examined on the part of the defendants, this wit-

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ness further testified: The goods were not charged to the plaintiffs, until sent for by them, and delivered; they were not liable to Thompson & Co., except for such as they sold, and then only under their guarantee; in settling up sales they gave their own notes, and not the notes of the purchasers, because they guaranteed the sales; if plaintiffs had sent for their goods, as we requested them to do, they would have been delivered; we were anxious they should send and take them, because the jobbers were getting sick of the goods at the prices.

In settling for sales, plaintiffs gave their own notes; that is the usual way.

At the time they made the second advance, nothing was done except to ask for and receive it; no further security was asked for by them.

The advance was all in their own notes. (It was agreed by counsel that these notes had been paid.)

If the goods had not been sold, and called for by them, they would have been on our hands; there was no understanding that plaintiffs should pay for any not sold.

Thompson & Co. stopped on a Saturday, September twentieth; their stopping was entirely sudden and unexpected; I was here the day before, and knowing the amount they had to pay, had spoken to some of my friends, who said they could have the necessary amount, and I left the city Saturday morning, at eight o'clock, and when I left, had no idea but that the house would go on; we had no expectation, when the second advance was made, of stopping; our arrangements had been made up to January; a call was made on us that we did not anticipate, and that occasioned our stopping.

Being again directly examined, this witness further testified: When the second advance was made, plaintiffs had not sold that amount of the goods, and that fact might have been adverted to; it was mentioned that what the jobbers had engaged from plaintiffs, with what the latter had sold, would cover the \$50,000; and I requested plaintiffs to send for the goods; I do not know that they never did send for them.

The counsel for plaintiffs next recalled on their part,

HENRY G. THOMPSON, who further testified: There is about \$7,500 still due the plaintiffs out of their second advance: the

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goods in suit were worth about \$3,700; we made about 800 bales of the plains, the last season; we had some on hand over from the year before; we sold none of the last year's through any other house than the plaintiffs.

It was admitted and agreed, by and between the counsel for the respective parties, that the value of the goods in question was \$3,706 52.

The plaintiffs here rested their case, and the defendants' counsel moved for a nonsuit, on the ground that the plaintiffs had shown no title to, or right to the possession of, the goods in question.

The court so held and decided, as also that the matters so given in evidence on the plaintiffs' part were not sufficient to entitle them to a verdict.

To which ruling and decision of the said court the plaintiffs' counsel excepted.

H. Ketchum, for the plaintiffs, insisted that the judge erred in granting the nonsuit, inasmuch as the proof given on the trial was sufficient to show that the plaintiffs were entitled to the possession of the goods, and that it ought at any rate to have been submitted to the jury; he further contended that the defendants, having shown no property in the goods, were not entitled to a judgment for their value.

Wm. M. Everts contra—

The following cases and authorities were cited upon the argument: *Haille v. Smith*, 1 Bos. & Pull. 563; *Holbrook v. Wight*, 24 Wend. 169; *Grosvenor v. Phillips*, 2 Hill, 145; 2 Kent Com. 820, note (b). 1 Starkie on Ev. 142.

BY THE COURT. DUEB, J.—The action given by the Code for the delivery of personal property is substantially the former action of replevin, changed, indeed, in its name, and modified in its form, but in its principle and its object identical. The plaintiff asserts a legal title to the property of which he claims the delivery, and to entitle him to the judgment which he seeks, it is a legal title that by the proper evidence he must establish.

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Hence the plaintiffs in this case were bound to prove upon the trial that they had an absolute or special property in the goods in question, and an immediate right to their possession. If they have failed in this necessary proof they were properly nonsuited, and the judgment for the agreed value of the goods founded upon the nonsuit must be affirmed. This view of the nature of the action for the delivery of personal property was adopted by this court in the case of *Robert v. Randall* (3 Sandford Sup. C. R. 707), nor do the provisions of the Code, as it seems to us, admit of any different construction. The plaintiffs could not have obtained a delivery by the sheriff of the goods in question, but upon an affidavit, stating that they were the owners, or were lawfully entitled to the possession by virtue of a special property therein (Code, § 207, sub. 1), nor can we doubt that the facts which were thus necessary to be stated to sustain their claim to a delivery are exactly those which they were bound to prove upon the trial to entitle them to a judgment.

The remarks that have now been made, are not merely prefatory, but involve in truth our decision of this case. The facts in evidence upon the trial, not only clearly show that the plaintiffs were not the owners of the goods in controversy, but in our opinion are entirely insufficient to prove that they had any special property, by which they could lawfully demand the possession. The sole owners of the goods were Thompson & Co., whose title was not meant to be divested by the agreement between them and the plaintiffs, until actual sales were made to jobbers or other persons, and the plaintiffs were their agents to effect such sales, acting under a *del credere* commission, and the notes, which they advanced to Thompson & Co., were a loan of their credit, not the consideration of a purchase. The principal witness for the plaintiffs expressly stated that if the goods were not sold by the plaintiffs as agents, they must have remained on the hands of Thompson & Co., and that they were not liable to Thompson & Co., except for such as they sold, and then only under their guaranty. No evidence was given on the trial that there had been an actual sale of the goods in question, before they were demanded from the defendants, and if the plaintiffs meant to rely upon a sale to a third person as

giving them a right to claim the delivery, it was upon them that the burden of proving the fact certainly rested. The judge, upon the trial, had no right to presume its existence.

It was very faintly contended upon the argument that the plaintiffs were entitled as absolute owners to the possession of the goods described in their complaint; but it was strenuously insisted that they had acquired a lien to the extent of their advance which gave them a special property and a lawful right to demand the possession. It is, however, the settled law that to the creation or continuance of a lien which a court of common law can recognise or enforce, the actual possession of the property upon which it is held to attach, is indispensable (*Godwin v. the London Assurance Co.*, 1 Black. 104; *Kinlock v. Craig*, 3 Term. R. 119, 783; *Combie v. Davies*, 7 East. 5; *Rice v. Austin*, 7 Mass. 197); and we apprehend that the books may be searched in vain for a case in which a lien conferring a legal title has been held to arise merely from an advance upon goods that remained in the possession or under the control of the original owner. Such a lien may, indeed, in some cases, be created and preserved by a mortgage in writing, but never by a mere implication of law. In the present case the original owners, Thompson & Co., retained the possession of the goods in question until they were passed to the defendants as their assignees; and that they should retain the possession until sales were made, and an order for a delivery to the purchasers given by the plaintiffs, seems to have been a part of the agreement between them and the plaintiffs.

It is this circumstance, the continued unbroken possession of the original owners, which distinguishes this case from those on which the learned counsel for the plaintiffs so strongly relied—*Haille v. Smith*, 1 Bos. and Pull. 563; *Holbrook v. Wight*, 24 Wend. 196; and *Grosvenor v. Phillips*, 2 Hill, 145.

In each of those cases there was a change of the possession by a delivery of the property by the original owner to a third person, as the agent or trustee for the plaintiff, and in each the ground of the decision was, that the possession of the agent or trustee was that of the plaintiff. By this possession the lien, which was relied on as giving a special property and legal title, was perfected.

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On the other hand, the case of *Nichols v. Crist*, 3 Price, 527, which was not cited in the argument, is quite decisive in favor of the defendants. In that case, a *del credere* factor had accepted bills drawn upon him by the owner of the goods, upon the faith of their consignment to himself, and the goods were actually put on board a vessel for the purpose of being delivered to him; but, as it appeared that the control of the property was still retained by the owner, it was held that the factor had not acquired a lien divesting the title of the owner.

The complaint, in the case before us, avers that the defendants were in possession of certain goods and chattels of the plaintiffs, to the immediate possession of which the plaintiffs were entitled; and upon these averments issue is taken by the answer. We are clear in the opinion that the judge rightly decided that neither of them was sustained by the proof. Whether the plaintiffs had an equitable lien which, upon a complaint properly framed, we might have enforced, is a totally different question, which, in this action and on the pleadings as they stand, we have no right to decide or consider. It is sufficient to say that the judgment in this suit will be no bar to any equitable relief to which they may be entitled, if that relief shall be properly sought.

The objection that the defendants, having no property in themselves, were not entitled to a judgment for the value of the goods, is certainly groundless. They were not bound to show property in themselves until a *prima facie* title had been established by the plaintiffs, and as, from the failure of this necessary proof, it resulted that the goods had been wrongfully taken from their possession, they were necessarily entitled to a judgment for their value. The judgment rendered is thus the only judgment that could have been given.

It is therefore affirmed with costs.

CHARLES T. SHELTON v. JOHN J. V. WESTERVELT.

Where an execution debtor agrees with a deputy sheriff that on the latter relinquishing specific property at the time actually levied upon, other property, ordered by the debtor, on his receiving it, shall be substituted as the subject of the levy, the agreement is void.

Where such property is received by the debtor and substituted after the return day of the execution, the sheriff acquires no valid lien upon it, and a subsequent *bond fide* mortgage of it will acquire a title good as against the sheriff.

Where property is substituted before the return day and levied upon, the levy is good, although the previous agreement for substituting it is void.

(Before DUEK, CAMPBELL, and BOSWORTH, J. J.)

May 16; June 26.

THIS action was brought to recover for the conversion, by the defendant, of a steam-engine and boilers. The plaintiff claimed under a mortgage executed to him by Sheldon & Duncan, on the 3d of May, 1849, to secure the payment of three promissory notes made by them, each dated April 1, 1849, and payable to the plaintiff, or order, one year after its date, two of them being for the sum of \$535 each, and the other for the sum of \$636. The mortgage was duly filed on the 4th of May, 1849, and was given for a good consideration, and was given and taken in good faith, and without any intent to defraud the creditors of Sheldon & Duncan.

The defendant justified as sheriff, under a pretended levy under and by virtue of an execution directed and issued to him on a judgment in favor of Thompson & Mason against Sheldon & Duncan, which execution was received in the sheriff's office on the 1st of February, 1849, and was returnable within sixty days after the receipt of the same by the sheriff, or on the 2d of April, 1849.

The engine and boilers in question were made at Springfield, Massachusetts, for Sheldon & Duncan, under an agreement between them and the maker, that they were not to become the property of Sheldon & Duncan, until put up for them in this city and put in complete running order by the maker, and had been accepted by and paid for by them. The boilers arrived and were on the premises of Sheldon & Duncan, in

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Eighth street, in this city before, and the engine not until after the 2d of April, 1849. They were put in working order about the 11th of April, 1849, and were accepted about that time and before the third of May thereafter. It does not appear how or when they were paid for.

The sheriff levied the execution under which he justifies upon an old steam-engine and boilers, on or about the 16th of March, 1849, then on the premises of Sheldon & Duncan, and placed a person in charge of the property. After that and before the arrival of the engine and boilers in question, and in anticipation of their arrival, it was verbally agreed between the deputy sheriff holding the execution and Sheldon, one of the defendants in the execution, and at the request of the latter, that if the deputy would permit Sheldon & Duncan to remove the old engine and boilers so as to make room for the new ones, Sheldon would consent to substitute the new ones on their arrival, as the subjects of the levy instead of the old. The plaintiff had no knowledge or notice of this arrangement. The deputy assented to this arrangement. The old engine and boilers were accordingly removed, and on the arrival of the new boilers and engine, the deputy, in pursuance of this arrangement, levied on them, so far as they could be levied on under such an arrangement, and placed a person in charge of them, in whose custody they remained until the time of the sale, which was the 2d of April, 1850. The substitution of the new for the old engine took place before the execution of the mortgage, but not until after the return day of the execution. The substitution of the new boilers for the old ones took place before the return day of the execution. The jury, under the direction of the court, rendered a general verdict for the plaintiff, and in answer to specific questions of fact submitted to them, found—

1. That the new boilers were levied upon before the second of April, 1849, but that the engine was not.

2. That the boilers were worth \$600 at the time of the sale of them by the sheriff.

3. That the engine and boilers at that time were worth the sum of \$2,000.

The judge at the time directed a judgment for the plaintiff

for \$1,833 37, the amount of the principal and interest of the notes secured by the mortgage, reserving for the consideration of the court at General Term, the question of the validity of the agreement between the deputy and the defendants in the execution, for the substitution of the new engine and boilers for the old ones, and also reserving for the judgment of the court the other questions arising upon the case.

Wm. M. Evarts, for the plaintiff.

A. J. Vanderpoel, for the defendant.

By THE COURT. BOSWORTH, J.—The jury have found that the engine was not levied upon before the return day of the execution. After the return day it was substituted for the old engine which had been regularly levied upon. This substitution was made in pursuance of a previous agreement between the deputy sheriff who had made the levy, and the defendants in the execution. The consideration of the agreement for the substitution by the execution debtors, was the relinquishment by the sheriff of the old engine from the levy made upon it. If the sheriff can justify the sale of the new engine, it must be on the ground that this agreement, and the delivery of the new engine to him in pursuance of such agreement, gave him a special property in it, with authority to sell it in satisfaction of the execution, which could not be defeated by a subsequent mortgage, *bond fide* taken, to secure an honest and just debt. Independent of, and in the absence of any such agreement, it certainly cannot be pretended that he can hold and sell property, acquired by the execution debtor, after the return day of the execution, or by virtue of a levy made upon it after such return day.

The mortgage having been taken *bond fide*, to secure a just debt, and without any intent to defraud creditors, is valid against all parties except such as can show a valid prior title.

If the new engine and boilers had not been substituted for the old, could the sheriff have maintained an action against the execution debtors on their promise to make such substitution? The deputy was not the agent of the plaintiff in the execution,

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in making this agreement. The sheriff would be liable to him for the value of the property, if, in consequence of relinquishing it from the levy, it should be placed beyond his power to reclaim and sell it on the execution.

The law imposes upon him the duty of safely keeping, and of selling the property according to law, and of paying to the plaintiff the proceeds of such sale. Any agreement with the execution debtor, by which he relinquishes to the debtor the possession and disposition of the property discharged from the levy, is a violation of his duty, contrary to law, and absolutely void. It was decided in *Strong v. Tompkins et al.* 8 J. R. 98, that a sheriff who took, on arresting a defendant, the note of a third person to the order of and endorsed by the defendant, instead of a bail bond, could not recover against the maker, notwithstanding he had paid to the plaintiff the amount of the judgment recovered in that action, and notwithstanding the note was received upon a special agreement that it should be applied to the settlement of the demands for which the suit was brought, in which such arrest had been made. The court said that the plaintiff in that case had no right of property in the note. He was not the legal holder, because the assignment to him was a nullity; and he had no more right to sue the defendants than if the name of the payee had been forged. To give effect to such contracts would lead to the greatest abuse and oppression, and would be suffering the provisions of a very beneficial statute to be eluded.

The same principle was applied in *Codwise v. Field*, 9 J. R. 263; and in *The Bank of Orange Co. v. Wakeman*, 1 Cow. 46. Vide *Burrell v. Acker*, 23 Wend. 609, and 2 R. S. 286, § 60.

The principle decided in *Strong v. Tompkins* is, that a sheriff cannot acquire any right from an agreement contrary to law and made by him as sheriff, nor justify any act done under it, when the rights of third persons are in question. Unless he can justify the taking and sale of the engine under this agreement, he is without any defence, so far as that portion of the property is concerned. The levying of the execution after the return day was passed, upon property subsequently acquired, was a nullity. (*West v. Shockley*, 4 Harrington, 287.) The relinquishment of the old engine and boilers was invalid as to

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the plaintiff. Notwithstanding that, he would have the right to have it resealed and sold to satisfy his execution. (*Colton & Ulman v. Camp*, 1 Wend. 365.)

The cases cited by the defendant to show that a levy may be good as against the execution debtor, which would be inoperative against a junior execution creditor, or a *bonâ fide* purchaser, have no application to this case. (*Ray v. Harcourt*, 19 Wend. 495; *Van Wyck v. Pine*, 2 Hill, 666; *Dresser v. Ainsworth*, 9 Barbour, S. C. 620.)

The new engine was not property which in judgment of law was bound by the execution from the time of the receipt of it by the sheriff, or at any time before the return day. It was not the property of the debtor until after the return day, and it is doubtful from the evidence, whether it was even within the city and county of New York before the execution had run out. There had not been, and could not have been, within the life-time of the execution, any levy, either actual or constructive.

There was therefore no levy to interfere with the right of Sheldon & Duncan to execute the mortgage. The agreement by force and virtue of which the sheriff claims the right to hold and sell the new engine under the execution, was utterly void, even as against the execution debtors, and is no answer to this action.

I think the right of the sheriff to hold the new boilers under his levy, is unimpaired by any fact proved in this case. Although the agreement for the substitution of them for the old was illegal and void, yet as they were actually levied upon before the return day of the execution, and taken in charge of the sheriff, they are as much bound by the levy as if no such agreement had been made. The validity of the levy, which it was his duty to make, is not affected by any void or illegal agreement respecting the new boilers. The sheriff claims nothing under or by reason of the agreement; whether he had made it or not, it was his duty, for aught that appears, to have levied upon these boilers. He did levy upon and sell them under the execution. The levy was prior to the execution of the mortgage of them to the plaintiff. There is no evidence in the case tending to show, that the delay of the sheriff to sell resulted from any in-

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struction from the plaintiff in the execution, or from any cause other than his own volition or the exercise of his own discretion. The pleadings do not show, as was insisted on the argument they did, that the notes described in the mortgage were in point of fact given at the time the mortgage bears date, and for the purpose of securing moneys advanced to pay for the new engine and boilers. The case made does not therefore show that the plaintiff furnished the money to pay for them, and at the same time took Sheldon & Duncan's notes for the amount, and a mortgage upon the property thus paid for, to secure the repayment of the advance, and that the title in them vested in Sheldon & Duncan simultaneously with the giving of the mortgage. What the rights of such a mortgagee upon the other facts appearing in this case would be, is a question which does not arise.

We are of opinion that the verdict should have been limited to the value of the new engine, which the jury found to be \$1400, and interest on it from April 2, 1850, the time of the conversion.

The judgment entered must be modified accordingly, and a judgment entered for \$1400, the value of the new engine, with interest on that sum from April 2, 1850, until the time of entering the judgment.

BROUWER, Receiver, &c. of THE PELICAN MUT. INSUR. CO.
v. JOHN H. and WM. H. HARBECK.

A Mutual Insurance Company, authorized by its charter, for the better security of its dealers, to take premium notes in advance of persons intending to receive policies, and to negotiate such notes for the purpose of paying claims or otherwise in the course of its business, may lawfully transfer such notes to a party who has insured in the company, on account of a claim for a loss, or to any person, on a discount of them at the rate of 7 per cent. per annum.

The transfer of such notes by the president alone, without a previous resolution of the board of directors, is valid, he being authorized by the by-laws to make contracts and transact the ordinary business of the Company.

And though such transfer amounts to over \$1,000, yet if made in and according

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to the ordinary course of its business, it cannot be avoided at the suit of a receiver subsequently appointed, notwithstanding the company was actually insolvent at the time, unless it was openly and notoriously insolvent, or the party to whom the transfer was made had notice of the insolvency.

The receiver of an insolvent corporation cannot impeach or disaffirm the lawful and authorized acts of the corporation.

Where the party receiving notes discounts them, and at the request of the Company pays a claim of its creditor, which was usurious but not known to the transferee to be so, the transfer to him is not thereby invalidated.

A transfer of property and effects of a company amounting to over \$1,000, can be lawfully made in and according to the ordinary course of its business without a previous resolution of the board of directors, viz. on the discount of a note, in payment of checks, or bills, or of debts, &c.

(Before CAMPBELL and BOSWORTH, J.J.)

May 17, 18; June 19, 1852.

THE facts of this case are fully stated in the opinion of the court.

F. B. Cutting, for plaintiff, argued the following points:

I. The transfer to the defendants of the effects of the company, to the amount of \$8,393¹¹/₁₀₀, was not authorized by a previous resolution of the Board of Directors, and is void. (*Johnson v. Brush*, 3 Barb. C. R. 207; 1 R. S. 591, sec. 8.) The term "effects" embraces every species of property, real and personal, including things in action. (1 R. S. 599, sec. 64.) The transfer of the effects in question was not within the exceptions specified in the statute. 1. They were not promissory notes, or evidences of debt, issued by the officers of the company in the transaction of its ordinary business. 2. Nor was it a payment in specie or other current money, or in bank bills. 3. The defendants were not purchasers for a valuable consideration and without notice.

II. There was no by-law authorizing the transfer; and if there had been, it would be void. (1 R. S. 600; sec. 1. sub. 6.)

III. The decision of the Chief Justice, that the plaintiff must prove open avowed insolvency; and that actual insolvency, unless coupled with proof that defendants knew the company to be insolvent, was not sufficient to maintain the action, was erroneous. (Fols. 121, 122.)

The statute declares that no payment made, or security given by any moneyed corporation when insolvent, or in contempla-

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tion of insolvency, with the intent of giving a preference to any particular creditor, shall be valid in law; and every person receiving any of the effects of the corporation shall be bound to account therefor, &c. (1 R. S. 591, sec. 9.) The object of the statute was to enforce an equal distribution of the assets, and is analogous to similar provisions in bankrupt laws.

IV. The Chief Justice erred in dismissing the complaint; he thereby decided that the transfer of the effects of the company was valid, although not authorized by any previous resolution of the Board of Directors; and took from the jury all questions of fact, and amongst others, the question whether the transfer was made when the company was, in fact, insolvent, and known to its officers to be so; whether it was made in contemplation of insolvency, and with the intent of giving a preference to the defendants over other creditors.

V. The company was, at the time of the transfer of its effects, actually insolvent, and was known by its officers so to be. At least, the evidence ought to have been left to the jury.

VI. There was evidence which ought to have been submitted to the jury, that the defendants knew or had reason to believe, or had notice enough to put them on inquiry at the time of obtaining the said effects, that the company was insolvent. If notice to the defendants was necessary, the court erred in shutting out proof of the credit of the company at that time. (Fol. 66.)

VII. The debt due to the Beldens was usurious and void, and the company was entitled to demand and receive from them the collaterals in their possession. The defendants, with notice of the usury, received these securities, and became substituted in the place of the Beldens, and the receiver has the same right to claim and recover these effects from the defendants, that he would have had against the Beldens, if they had continued to hold them. (Complaint, fols. 9, 10.) The answer does not controvert the averment of usury.

VIII. The judgment of the judge at special term ought to be reversed, and a new trial ordered.

James W. Gerard, for defendant, insisted as follows—

I. 1 Revised Statutes, 722, third edition, enacts. "That no

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conveyance, assignment, or transfer, not authorized by a previous resolution of its board of directors, shall be made by any such corporation, of any of its real estate, or of any of its effects, exceeding the value of \$1,000; but this section shall not apply to the issuing of promissory notes, or other evidences of debt, in the transaction of its ordinary business, nor to payments in specie or in bank bills made by such officers, nor to avoid any conveyance, assignment, or transfer, in the hands of a purchaser, for a valuable consideration, and without notice."

This is not a case of a collusive transfer, made with an illegal intent, out of the ordinary course of the business of the company, which the statute was intended to remedy. These notes were not directed into a channel foreign to the business of the company, but were used in the course of the regular business of the company to pay its debts. The title of the Messrs. Belden to three of the notes accrued on the 12th November, 1847, when they lent on them \$2,500; and the title of Harbeck to the other notes accrued on the 6th and 7th December, when they lent on them \$2,000. The equity of redemption of the company to the notes was extinguished on the 14th December, when the Messrs. Harbeck discounted the notes and paid the loan to the Beldens, and deducting their own loan, and the loss on the brig George, paid the balance in cash to the company.

II. The transfers of the notes, and the signing of the check on their face, purport to be the act of the company in the manner and form required by their by-laws, and the invariable usage of the company. The statute, even in cases where it applies, can only operate on those transfers where the transferee knew that there was no resolution, so as to create an illegal intent, which is the *gravamen* of the complaint. In this case, no such knowledge was proved or pretended.

The endorsements being regular in form, as the endorsements of the company, the legal presumption is, that the notes were transferred according to law; and the *onus* is on the plaintiff to show that the Harbecks knew that they were not so transferred; and no proof of any such notice is shown or pretended. (1 Hill, 11, *Safford v. Wykoff*. 7 do. 91, *Bank of Vergennes v. Warren*. 1 Denio, 520, *Gillett v. Campbell*. 3 Denio, 254, *Aimes v. Mutual Insurance Co.* 1 Coms. 290. 22 Wend. 348.)

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III. But by the twelfth section of the act incorporating this company, these notes are expressly authorized to be negotiated to pay losses or otherwise ; and this section, and the organization and objects of mutual insurance companies, and the whole spirit of their charters, override and modify the eighth and ninth sections of the prior statutes of 1830, applicable to money incorporations. And the third and fifth sections of the charter of the Atlantie Company authorize the company to vest that power in their officers. (Laws of 1843, p. 65.)

This modification, authorizing the officers to pay losses by a transfer of notes, or by converting them into money, was indispensable to the execution of their ordinary daily business, as the trustees met but once a month, and their business would stop if their notes could not be turned over in specie, or converted into cash, to meet the daily losses of the company. And such was their unvaried usage ; for the minute books of this company do not contain a single resolution of the transfer of notes to pay losses, nor was such a resolution ever passed by any one of the Mutual Insurance Companies in our city. (Case, fol. 251.)

By the ninth by-law of the Pelican Company, and uniform course of business from its commencement, the trustees allowed and sanctioned the President to adjust and pay losses, and for that purpose to use the notes of the company. The receiver, therefore, is estopped from committing a gross fraud, by claiming adverse to the by-law and practice sanctioned by the trustees.

This custom was in issue. (Ans. f. 46, 53. Replication, 59.)

The third section of the charter allows the corporate powers to be exercised by the trustees themselves, and by such persons as they may delegate the power.

Such delegation may be shown by express resolution, or may arise from the general course of business. The ninth by-law was such an express delegation ; and under it the President alone adjusted and paid losses* by the transfer of notes, or by getting them cashed and paying in money, without the agency of the Board of Trustees, or any other person or persons.

But if the eighth and ninth sections of the general act, applicable to money corporations, was not modified by the twelfth

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and other sections of the charter of this company, the defendants were purchasers of these notes for a valuable consideration, within the exception in the eighth section, and had no notice that the transfer of the notes to them or to the Beldens was made without a previous resolution of the trustees. (*Meyer v. Aspinwall*.)

The consideration was not only a valuable, but was a present one, parted with at the time of the transfer,—viz. the Beldens lent \$2,500 on their notes; Harbecks lent \$2,000 on their notes, and on discounting the notes also paid the Beldens \$2,600. In fact, the whole transaction may be considered a discounting of the notes, and applying part of the proceeds to pay the loss on the brig George of \$3,010, which was conceded by the complaint (fol. 8) to have been adjusted, liquidated, and due.

The payment of a loss was decided in *Aspinwall v. Meyer* to be a valuable consideration, within the exception of the eighth section.

That the eighth section cannot apply to a payment in money or notes of a loss, made by an insurance company in the ordinary course of its business, but only to a transfer, conveyance, or assignment of its real estate or similar permanent effects as contra-distinguished from its notes or cash with which it paid its losses, is clear from the language of the ninth section, which makes an evident distinction between such transfer and the payment of a debt or loss, for it says, “no such conveyance, assignment, or transfer, nor any payment made or security given, &c., shall be valid, &c., in case of insolvency.

IV. The insolvency that avoids a transfer payment or security to a creditor means an open notorious insolvency, by which the creditor is presumed to have notice,—or secret insolvency with actual notice.

The statute did not mean to avoid payment of losses made by a mutual insurance company in the ordinary course of its business, while the company is going on with its business apparently as usual,—although it might afterwards appear, that, if they had wound up that day, the company with its assets was utterly unable to meet its debts,—but only to avoid one creditor knowingly getting a preference in the distribution of assets after a company has stopped or failed in its business, in the

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popular sense of the term, or is about to do so, and the creditor knowing it, unjustly and with an illegal intent, gets such preference for an old debt. (2 Young and Jervis, 469, *Cullen v. Langer*.)

That this is the intention of the statute is manifest—first, from its phraseology; second, from the injustice which would otherwise be done to insurers who received payment of losses, which they may be called upon to refund at any future period of time within six years on a company openly bursting up, and a receiver appointed; and third, from the penal consequences attached to every director who assents to such transfer, security, or payment, by the tenth and eleventh sections of the act,—viz. a liability to the creditors and stockholders to the extent of loss thereby sustained, and to be liable as a criminal for a misdemeanor, punishable by fine and imprisonment.

V. Again: when the Beldens and the Harbecks acquired the title to these notes, on the 12th November and the 6th and 7th December, they were not creditors, nor did they receive them in any such capacity, but as lenders of money presently advanced on the strength of these notes,—a present consideration,—which moneys were applied by the company to its use.

VI. Neither on these days, nor on the 14th December, when the transaction was closed by the discounting of the notes, had the company failed or stopped its business, or contemplated doing so. On the contrary, they continued their business for nearly three months afterwards, effecting policies and paying losses; and contemplated new officers to be brought in, with a new subscription and new patronage, as appears by the minutes of the company.

VII. Open insolvency was not pretended; and if the company was actually insolvent, there was not a particle of proof to go to the jury to show that they, the Beldens or the Harbecks, knew it.

The Harbecks had been old insurers with the company; and so far from suspicion of their insolvency, they in August, 1847, gave to the company a subscription note of \$3,000, which they discounted and paid in October or November, before due; and the company owed on it, at the time of their failure, \$2,000. (See Case, fol. 258.)

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William H. Harbeck, in June, 1846 (Case, fol. 154), had been elected a trustee; but he never attended a meeting. From ill health, he resigned July 14, 1847 (fol. 109). Dixey, from the same office, was named as a trustee, who never attended but one meeting. (See Case, fol. 254.)

It requires mutual knowledge of insolvency or contemplated insolvency to avoid the payment.

The statute requires an illegal intent. There can be no illegal intent without knowledge. The complainant well knew that; for the *gravamen* of the complaint is to carry out an illegal intent. (Complaint, fol. 16, 17, 18, 21.)

VIII. The transaction was not paying or preferring a creditor at all, but it was a negotiating of notes for present consideration, to pay losses and raise money for the use of the company; and there was no evidence to submit to the jury. Suppose these notes had been discounted on the 14th December, by the bank with which the company kept its account, would any sane man pretend to question the title of the bank to these notes?

There is not a particle of law, justice, or honesty, in the claim of the receiver; and every point that can be raised in this case has been decided by this court, in the cases of Meyer and Aspinwall, and Harbeck and Bishop, confirmed by the Court of Appeals.

IX. These Mutual Safety Insurance Companies are not monied corporations within the meaning of the Revised Statutes. They were not in existence then, nor were they contemplated. (1 Denio, 520, *Gillet v. Campbell*.)

BY THE COURT. BOSWORTH, J.—On the 12th of Nov., 1847, the Pelican Mutual Insurance Company borrowed of C. & G. Belden \$2,500. No time was fixed by the terms of the loan when the money was to be repaid. The company gave a memorandum check for the sum borrowed, signed by their president, payable to the order of and endorsed by their secretary, and at the same time delivered to the Beldens as collateral security for the return of the money three promissory notes belonging to the company, and being part of their property and effects.

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On the 6th of December the defendants loaned to the company \$1,000, and on the 7th of December the further sum of \$1,000, and on one of those days received from the company as collateral security for the repayment of the loans, promissory notes, being of the property and effects of the company, and amounting to between \$4,000 and \$5,000. The moneys thus borrowed of the defendants and the Beldens were properly applied to the use of the company in the transaction of their ordinary business. The notes turned out as collateral were taken in the regular course of the company's business, for premiums, for risks on various vessels.

On and prior to the 14th of December, 1847, the company owed the defendants \$3,010, for a loss, under a policy of insurance, effected by the defendants on the brig George, in March, 1846.

On the 14th of December, the defendants discounted for the company all of the collaterals which were held by themselves and the Beldens, and retained pursuant to the terms of the arrangement under which the discount was made.

Their loan of	-	-	-	-	-	\$2,000
The amount of loss of brig George	-	-				3,010
For discount on the notes and interest on the money lent	-	-	-	-	-	649 31
And paid to the Beldens for the company their loan of	-	-	-	-	-	2,500
And for interest on their loan	-	-	-			120
And to the company the balance of the proceeds, being	-	-	-	-	-	113 98

These notes were discounted by the defendants at the rate of seven per cent.

There was no resolution of the trustees formally authorizing the transfer of the collaterals to either the Beldens or the defendants, or the transfer of them to the defendants at the time the latter discounted them.

The company continued to transact business and take risks until the 28th of January, 1848.

On the 3d of January, 1848, creditors of the company pre-

sented to the Supreme Court a petition, which set forth the insolvency of the company, their inability to pay their debts, and prayed for an order or judgment dissolving the company, and for the appointment of a receiver, and for an injunction.

On the 18th of February, 1848, the Supreme Court decreed the dissolution of the company, granted an injunction, and ordered the appointment of a receiver. The plaintiff was appointed such receiver on the 14th of March, 1848.

The plaintiff brings this action to avoid the transfers of the notes discounted by the defendants on the 14th of December, 1847, and to compel them to account for the moneys they have collected upon any of these notes with interest, and to pay the value of such of them as may remain in their hands uncollected.

The plaintiff's counsel insisted that the transfer to the defendants on the 14th December, 1847, of the notes in question, amounting to \$8,393 $\frac{29}{100}$, was void on two grounds:

1. Because the transfer was not authorized by a previous resolution of the board of directors.

2. Because (as he insisted the fact was), the company at the time of the transfer was actually insolvent, or made it in contemplation of insolvency, and with the intent of giving a preference to the defendants over other creditors.

He also insisted that there was, at least, sufficient evidence to call for the submission to the jury of the question, whether the company was not in fact insolvent, and whether the defendants did not know of the fact, or have such notice as made it their duty to inquire how that fact was. He also objected that proper evidence to be submitted to the jury was excluded by the court. The Chief Justice before whom the cause was tried, decided that on the evidence given, the plaintiff could not recover, unless he proved, that at the time of the transfer the company was either openly and avowedly insolvent, or actually insolvent, and that the defendants had knowledge of it.

When the plaintiff rested, the Chief Justice, on the motion of defendants' counsel, dismissed the complaint, on the ground that there was no evidence of open or distinct insolvency, nor sufficient evidence of a knowledge by the defendants of actual insolvency, to entitle the plaintiff to have that question of fact

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submitted to the jury. The plaintiff excepted, and the only questions presented for review, relate merely to the accuracy of the decisions made at the trial.

It appeared very clearly from the evidence, that it was part of the ordinary and accustomed business of the president to adjust and pay losses. One of the by-laws (the third) of the company gives authority to the president, vice-president, or either of them, "to sign the policies of the company, and transact its ordinary business."

The ninth by-law gives them "authority to settle and pay all claims for losses and return premiums in full, or by compromise, except such claims as in their judgment may be deemed of a doubtful character, in which case the same shall be referred to the committee of advice, and settled or adjusted as the committee may determine."

In 1845-6 the company occasionally paid losses in notes. These notes being payable one year from date, it was difficult to get them discounted by the banks, and sometimes money was borrowed to pay losses. The president transacted the business of adjusting and paying the losses. This course of business was not only well known to the trustees, but it was expressly provided by the by-laws that the president might transact this business and all the ordinary concerns of the company.

I think this mode of dealing and transacting the business of the company is clearly authorized by its charter. The fourth section declares that "it shall possess all the powers and privileges, and be subject to all the restrictions, reservations, and limitations, which are reserved, granted, or imposed upon the Atlantic Mutual Insurance Company by the act incorporating that company," with two exceptions, which have no bearing upon any point controverted in this action. (Laws of 1843, p. 66, § 4.)

The act incorporating the Atlantic Mutual Insurance Company, provides that "all the corporate powers of the said company shall be exercised by a board of trustees, and such officers, clerks, and agents, and other persons as said trustees may appoint from time to time." (Laws of 1842, p. 262, § 3.) It authorizes the trustees "to make such other by-laws as may be deemed

necessary for the government of the officers and the conduct of their affairs. (Id. § 5.) That the company, for the better security of its dealers, may receive notes for premiums in advance, of persons intending to receive its policies, and may negotiate such notes for the purpose of paying claims, or otherwise, in the course of its business." (Id. § 12.)

The company is expressly authorized by its charter to negotiate notes for the purpose of paying losses: so far as the transaction of the 14th of December, 1847, was a negotiation of its notes to pay losses under the policy of insurance on the brig George, its legality is found in the charter of the company, and is valid, unless it was of such a character as to subject it to the operation of the prohibitory provisions of the 8th or 9th section of the 1st of R. S. p. 591.

It certainly cannot be of the least consequence whether they are negotiated directly to the person to whom the loss is payable, or to some third person who is willing to discount them, and thus enable the company to pay the loss in money.

The act is explicit that they may not only be negotiated for the purpose of paying claims, not losses merely, but claims, or "otherwise, in the course of its business."

The negotiation of notes to the Beldens on the 12th of November, and to the defendants on the 6th and 7th of December, as security for money borrowed of them, was a transaction in the course of its ordinary business. The money was borrowed for the use of the company, was applied to its legitimate business, and for aught that appears in paying losses. Those who loaned the money had a just claim against the company for its repayment; the company was authorized by its charter to negotiate its notes for the purpose of paying these claims. It did so negotiate them on the 14th of December, 1847, to the defendants, who retained sufficient of the proceeds to satisfy, and in payment of the amount due them, and paid for the company to the Beldens and to the company the residue of the proceeds, in cash, amounting to the sum of \$2,733⁹/₁₆.

The transaction was clearly a proper one, unless it can be avoided on the ground that it falls within some one of the prohibitions contained in the 8th or 9th section of 1 R. S. p. 591.

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I think it does not come within any prohibition contained in the 8th section.

That section allows the issuing of notes or other evidences of debt by the officers of a company in the transaction of its ordinary business, amounting to more than \$1000 at a time. It was insisted that the issuing of notes or other evidences of debt, as here used, means obligations or promises to pay, made by the company itself, and not notes owned by it and made by third persons. If this be so, it is not obvious that this section can have any full practical application to incorporations of the nature of this one. Ordinarily it could not well have any notes or evidences of debt to issue except those made by its dealers. The Revised Statutes declare that "the term, evidences of debt," as used in this title, shall be construed to embrace every written instrument or security, for the payment of money, importing on its face the existence of a debt, and whether under seal or otherwise." (1 R. S. 599, § 65.) The statute therefore makes it include evidences of debts, other than of the debts of the company itself. Neither is it obvious if this claimed construction be correct, why the transfer by a bank of \$1000 at a time, of bills made by other banks, on discounting a note, is not as much prohibited by § 8, as a transfer by this company of its premium notes in payment of a claim or on a sale of them for cash.

This transaction was, in effect as well as in form, either a sale of the notes upon a discount of them by the defendants, or a negotiation of them in payment of claims. Either disposition of them is expressly authorized by § 12 of the act of 1842. (Laws of 1842, p. 263.)

The president could lawfully be authorized to transact such business. The uniform usage of the company in transacting it through him, coupled with the powers conferred by the by-laws, constituted him a fully authorized agent for that purpose, and his *bond fide* transactions with its dealers bind the company and the plaintiff. (*Howland v. Myer*, 3 Coms. 290; *Hyde v. Lynde*, 4 Coms. 387.) I do not think that a previous resolution of the company is necessary to authorize each or any particular transfer by an incorporation of over one thousand dollars of its

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effects, where the transfer is made in and according to the ordinary course of its business, and to pay just claims. (2 Sandford S. C. R. 180 ; *Aspinwall v. Myer*, S. C. 3 Coms. 290.)

I think that the complaint was properly dismissed, and that the plaintiff could not recover on proving less than was required of him at the time. If he could have proved that the company was openly and notoriously insolvent on the 14th of December, 1847, or that it was actually insolvent, and that the defendants had knowledge of the fact, then the discount of the notes might have been regarded as a transaction, in effect, designed to secure payment to the defendants of the loss that had been incurred by the company under its insurance of the brig George; and to prefer them to that extent over other creditors. The only words in the 9th section which could, even in that aspect, be regarded as descriptive of this transaction are, "no transfer, nor any payment made, by any such corporation when insolvent, or in contemplation of insolvency, with the intent of giving a preference to any particular creditor over other creditors of the company, shall be valid in law." There certainly was no judgment suffered, lien created, or security given. There was a transfer of some notes which the Beldens held as security for money loaned. The other notes were held by the defendants at the time, as security for moneys previously loaned by them. The notes held by each amounted to more than their loans, and could be lawfully retained until the loans were repaid. The transfers made at the time of the loans were not made with intent of giving a preference, or to secure any pre-existing debt. Money was then borrowed temporarily on the security of the transferred notes. It was certainly lawful to repay the loans out of the proceeds of such notes. It was lawful for the defendants, at the instance of the company, to discount at the rate of seven per cent. the notes held by the Beldens, and pay the latter the amount of their loan and interest. There was nothing as to which the defendants could be preferred, or which the company could have then had an intent to prefer, unless it was the debt for the loss of the brig George. Unless such facts could be proved as would clearly show that the purpose of the defendants in discounting the notes on the 14th of December was to obtain payment of that debt from a company insolvent,

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and known to be so, there could be no ground for saying that the transaction was a payment made by an insolvent company with intent to prefer one of its creditors over another. If the transfer or the payment, whatever it may be called, was not made with that intent, then it is not prohibited by the ninth section.

It cannot be successfully pretended, that if a company of this character which does not intend to suspend operations, or believe that it must necessarily fail, and continues its business, believing it will sustain itself by means, which it confidently expects to be able to command, but which it ultimately fails to get, cannot make valid payments to its *bonâ fide* dealers, while in this condition, although the result may show, that in point of fact its means were insufficient when these payments were made to satisfy its creditors in full.

The condition of these defendants, on the 14th of December, 1847, was this: They held \$3,500 (in amount) of notes of the company, as security, for a loan of \$2,000, made on their credit. The company owed them another debt of \$3,010, contracted in the regular course of its business. They received from the company, notes amounting, with those they held, to \$8,393²²/₁₀₀: they took these notes in satisfaction of the loan of \$2,000, and of the interest due, on account of their debt of \$3,010, and actually advanced in cash \$2738²²/₁₀₀.

Unless all this was done merely to prefer them, as to the debt of \$3,010, over other creditors, and with that intent, why should they not retain the notes? And how can the intent thus to prefer them exist, or be established, unless it be true that the company making the transfer was, in fact, insolvent, and the defendants had knowledge of that fact. Unless they knew of such insolvency, or believed it to exist, the idea of obtaining a preference by the transaction, or the possibility of that being an inducement to it, would be out of the question.

What the actual condition of the company then was, is not precisely shown. There was evidence enough, I think, to justify the submission of the question, of its being, in fact, unable to pay all its debts, but not to justify a jury in finding, that the defendants knew or believed that to be the fact. The evidence showed that the defendants advanced their subscrip-

tion note to the company in August, 1847, for \$3,000, and discounted it for the company in October or November, 1847. That the company yet owes them at least \$2,000, on this note. If they were favorite creditors whom the company intended to prefer, or who sought payment by way of preference through the transaction of December, 1847, it is singular that no attempt was made to obtain payment of the amount owing to them by the company. There was no evidence that the defendants at any time applied to any officer of the company for payment or security, or conversed with them or with any one else relative to the particular condition of the affairs of the company, or knew or heard that dealers who applied for payment of liquidated or conceded losses were refused payment; or delayed in receiving it. The company continued to pay losses until the first of January, 1848. The secretary testified that on the 28th of December the company paid losses to the amount of \$9,000, and that it had then a surplus of assets. If the company was actually insolvent, there was no evidence tending to show that the defendants knew that fact.

Without such evidence the transaction of the 14th of December, between the defendants and the company was, as between them, one that occurred in and according to its ordinary course of business, in which a loss owing was paid by the company, and the defendants discharged a just claim and *bond fide* advanced money to the company.

That the intent to prefer one creditor of an insolvent company to another, is essential to render a transfer by such a company invalid, is illustrated by § 71, of the article in relation to the voluntary dissolution of corporations. (2 R. S. 469, § 71.) That section declares all transfers made, after the filing of a petition for dissolution, in payment of, or as security for a pre-existing debt, or for any consideration, void as against the receivers who may be appointed, and as against the creditors of the corporation, irrespective of the intent with which the transfer is made. That provision applies as well to the case where a petition for a dissolution is presented by the directors, trustees, or other officers of a corporation, as by its creditors. (2 R. S. 463, § 39, 40, and 41 and 42; and id. 467, § 58, 65, 67, 68, 70, and 71.)

D.—I.

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§ 9 of 1 R. S. 591, declares transfers by an insolvent company invalid when made with intent to pay or secure one creditor, in preference to another. It was not intended to invalidate a fair *bonâ fide* transaction between itself and one of its dealers, who, without notice of its actual insolvency, discounted its notes according to its ordinary course of business, although as part and parcel of the transaction he was paid, and cancelled a just claim.

The defendants' counsel, referring to the 9th of December, 1847, asked a witness this question: "What was the credit of the company at that time?" Upon objection, the question was excluded, and an exception taken to the opinion of the court: This decision, taken in connexion with the further decision that the plaintiffs might show open and notorious insolvency, or actual insolvency and knowledge of it by the defendants, must be regarded as conclusive on this motion, that the question was not put for the purpose of proving that the company was then generally reputed to be insolvent: that course of inquiry was expressly permitted to the plaintiff's counsel by the court; the question, upon all fair intendment, must be deemed to have been put with a view to ascertain rather the relative standing of the company, as to the extent of its business, the general character of its risks, and the amount of its capital, or other points entirely compatible with the absence of all suspicion of insolvency, than its general reputation for actual solvency or insolvency: I think the question as put was properly excluded.

It requires a somewhat strained construction, in which every inference and intendment must be taken unfavorably against the defendants, to hold that the loan by the Beldens was usurious. Whatever the contract was, the defendants were not parties to it. They do not claim under it, nor do their rights depend upon it. If the company, in the ordinary course of its business, deemed it for its own interests to pay a usurious rate of interest, I do not see that after having paid it they had any rights left, except to bring an action within one year thereafter, to recover back the usurious excess from the person receiving it. (1 R. S. p. 772, § 3.)

The defendants did not receive this excess. They advanced

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the \$2,620 for the company to the Beldens, and it does not even appear that they knew any part of the advance was to compensate the Beldens at a greater rate than 7 per cent. for the loan of money. There is nothing in the evidence upon this point establishing any right to have the transaction of the 14th of December avoided on the ground that the loan by the Beldens on the 12th of November was usurious.

This case has been considered upon the assumption that the provisions of the 8th and 9th sections of 1 R. S. p. 591 are applicable to this company, so far as they do not conflict with the terms of this charter. Whether they are or are not applicable, it is unnecessary to decide. If applicable to that extent, they do not invalidate the transaction of December 14th, if the view that has been taken of it be correct.

The first and second articles of that title treat of corporations whose powers, by the terms of their charter, are to be exercised by a board of directors. Section 63 of the third article of that title declares that the term directors, as used in that title, shall be construed to mean all persons having by law the direction or management of the affairs of any such corporation, by whatever name they may be described in its charter, or known in law. (1 R. S. p. 599, § 33.)

Bronson, Ch., in *Gillett v. Campbell*, expressed the opinion that sections 8 and 9 only extend to such moneyed corporations as are by their charters subject to the management of a board of directors, trustees, or other officers. (1 Denio, 523.)

That they did not extend to corporations whose powers, instead of being made by their charters exercisable by a board of trustees, might be vested at the will of the corporation in a single agent or officer.

It is unnecessary, on the facts appearing and evidence given in this case, to decide that question, and no opinion is intended to be expressed upon it. We are of the opinion that no error was committed by the judge at the trial, and that a judgment should be entered in favor of the defendants.

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GOELET v. COWDREY.

In pleading the statute of frauds, an express reference to the statute by its title or otherwise is not necessary. It is sufficient to set forth the facts which render its provisions applicable.

The words "at the time of sale," in § 4 tit. 2 of the statute of frauds, must be strictly construed, and mean that the memorandum which is required to be made by an auctioneer shall be made *eo instanti* that the sale is completed.

In this case, the price of the goods (a pair of horses) sold at auction exceeded \$50, and the memorandum of the auctioneer was not completed by the entry of the name of the person on whose account the sale was made until some hours after the sale. *Held* that, from the want of a sufficient memorandum or note in writing, the contract was void.

Held also, that there was no evidence of such a delivery as could render the contract binding without a memorandum or note in writing.

Judgment at special term for defendant affirmed, with costs.

(Before OAKLEY, CH. J., and SANDFORD, J.)

June 25; June 26, 1852.

THIS was an appeal from a judgment rendered at special term upon a report of the referee in favor of the defendant.

The action was brought to recover the difference between the price for which a pair of horses belonging to the plaintiff, it was alleged, had been sold at auction to the defendant, and the price for which they were resold on his account in consequence of his refusal to accept them. The defence rested mainly on the statute of frauds.

That the points raised by the counsel and the decision of the court may be properly understood, it is deemed necessary to give the pleadings and the material parts of the evidence before the referee.

The complaint and answer are as follow—

The complaint of the plaintiff, *Robert Goelet*, shows to this court, that on or about the 26th day of April, 1851, he sold, by his agent, Henry H. Leeds, to the defendant at public auction, a pair of horses, and that then and there the defendant purchased the same, and agreed to pay for the same the sum of two hundred and seven dollars and fifty cents. That the said sale was for cash, and that the plaintiff, on the day of sale and subsequently, offered to deliver the said horses to the defendant

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wherever and whenever he should direct the same to be delivered, and requested the defendant to accept the same, and pay for the same as aforesaid. That the defendant neglected and refused to accept or pay for the same ; that on the fifth day of May, 1851, the plaintiff gave the defendant notice that unless the defendant paid for the said horses before twelve o'clock on Wednesday then next ensuing, May 7th, they would be sold on his account at the auction store of Mr. Leeds, at the said hour, and in the meantime would be advertised for sale ; that the defendant would be credited the amount they would bring, and would be charged the amount he originally bid for them and the expenses of the delay and resale. That the defendant still persisted in his refusal to pay for the said horses, and that on the said 7th day of May, at 12 o'clock, in pursuance of such notice, they were sold at public auction for the sum of one hundred and five dollars, that being the highest sum bid for the same. That there was a deficiency on such resale of one hundred and two dollars and fifty cents, over and above the expenses of such resale, which amounted to ten dollars and fifty cents. That the plaintiff has since such resale requested defendant to pay such deficiency and expenses, but the defendant has refused so to do. Wherefore the plaintiff demands judgment against the defendant for the sum of one hundred and thirteen dollars, with interest from May 7th, 1851, and the costs of this action.

The defendant, *Edward M. Cowdrey*, for answer to the complaint of the above-named plaintiff, says, that the plaintiff ought not to have his action against him, because he says that there never was any note or memorandum in writing of any such contract of sale as in the said complaint stated, made at the time of such sale, specifying the terms of the said sale, the name of the purchaser, and the name of the person on whose account such sale was made.

And this defendant further saith, that the said plaintiff ought not to maintain his said action against this defendant, because, he saith, that on the day when the said supposed sale is alleged to have been made, and very shortly thereafter, this defendant called at the office of the auctioneer, in the said complaint stated, and inquired of the clerk charged with the business of

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the said sale for the said horses, and informed him that he was then ready to pay for the same, and when and where this defendant was ready to receive and pay for the said horses the sum of two hundred and seven dollars and fifty cents, and the said defendant then and there demanded the delivery of the said horses to him ; and this defendant could not then and there obtain the said horses, and was informed by the said clerk that he did not know where the said horses were, nor to whom they belonged, and that if this defendant would pay for the said horses, they would be sent according to the directions of this defendant, after four o'clock of that afternoon ; and thereupon, this defendant informed the said clerk, that he, this defendant, wanted the horses then, and as he could not obtain them, he should decline to have anything more to do with them. And this defendant saith, that the said horses were not ready for delivery to him when he called to pay for the same, as aforesaid, and have not at any time since been ready for delivery at the place of said pretended sale. And he further saith, that the said horses have not at any time been tendered to this defendant.

And this defendant further saith, that he has not sufficient knowledge to form a belief as to the matters in the complaint stated, relating to the resale of the said horses.

Wherefore, this defendant demands judgment against the said plaintiff for his costs and charges in this suit.

The reply took issue upon the same matter in the answer.

By the consent of the parties, Michael Ulshoeffer, Esq., was appointed the referee, to hear and determine the issues made by the pleadings.

On the hearing before him, M. R. FLINN, a witness for the plaintiff, testified :

That the books he then produced, were the sales books of Henry H. Leeds & Co. That there was a memorandum entered in one of the sales books, April 26th, 1851, in the words and figures following :

Goelet, 2 horses, Cowdrey, 207 50.

That the memorandum was in his handwriting, that he made it when the horses were sold. That there was written across the memorandum these words: "Sold for H. H. Leeds & Co. by

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W. Irving." That this was in Mr. Irving's handwriting, and that Mr. Irving is salesman in Mr. Leeds's office.

That in the second book there was a memorandum under the date of May the 6th and 7th, 1851, as follows:

Goelet, 1 pair horses. J. Roosevelt, 105.

That there was no stable or place for horses to stand at the auction room. That he could not remember whether Cowdrey gave his first name, but always enters the name of the purchaser as given. That the horses were at the first sale sold from a memorandum.

Being cross-examined for the defendant, he further testified:

That he is entry and delivery clerk; did not know the defendant at that time; that the word Goelet in the first memorandum is not in his handwriting, but in that of F. W. Leeds.

The sale was made at about 12 or 12½ o'clock in the front of the auction room; that he stood by the door when he took down the memorandum. A carriage was sold at about the same time; previous and subsequent sales were made inside the door; cannot recollect that Irving made the other sales. Before the sale of the carriage and horses, they were selling goods inside the store by catalogue, and stopped the sale of those to sell the carriage and horses; after they were sold, they proceeded to finish the sale inside by catalogue, during all which time the sales book was not out of my possession.

That he had the sales book in his custody till six other sales were made after the horses. That goods are sold by a catalogue or manuscript. F. W. Leeds is a clerk in the store, who makes entries of goods sent for sale, and account sales for the owners; his usual place is in the counting-room in the back part of the store, but facing the street. That he did not know where F. W. Leeds was when the horses were being sold. That after he had finished with the book he placed it on the desk of the cashier, who makes out bills for the purchasers; keeps a book in which he enters the goods sent to the store; did not receive or enter the horses, and cannot say whether he knew the owner's name when they were sold.

F. W. LEEDS, another witness for the plaintiff, testified that the first column of the columns of entry in the sales book is appropriated to the owners' names, the next to the numbers on

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the catalogue or manuscript, the next to a description of the article sold, the next to the name of the purchaser as given, and the next to the price. That the name Goelet was in his handwriting, and he had a strong impression he wrote it the same day; he copied it from a memorandum sent to him by Mr. Irving. That the second sale is in the handwriting of Mr. French, who has left the store; that he recollected Mr. Roosevelt's name being called at the sale, but does not remember the price he paid.

On cross-examination he testified as follows: That he thought and had a strong impression that he entered the name Goelet, the evening of the sale; could not enter it sooner, as the cashier had to have the book to make out bills; that he entered it from a memorandum handed him by some one that he does not remember, but in Mr. Irving's handwriting; that he did not enter the date of the sale, and could not state, irrespective of the book, what day of the month the entry was made.

— BERGH, a witness for the defendant, testified, That he purchased the carriage that was sold at the same time, with the horses; that after the purchase he ascertained Mr. Cowdrey, the defendant, had purchased the horses, and asked him to allow his horses to take witness's carriage up town; on his consenting, witness said to the coachman that he could drive before Trinity church, out of the way, and wait till the accounts were settled; instead of waiting he drove off; that Mr. Cowdrey and witness then went to the back office, and asked the cashier for bills, and whether the horses could be delivered at once; that his reply to us both was, they could not, for he did not know the owner's name, nor where they were, and that owner did not wish his name known, and that they could not be delivered before four o'clock; the carriage, at that time, had been driven away; that witness and Mr. Cowdrey were informed that Mr. Miner, who was then selling in Broome street, might know the owner's name; that the horses would be delivered wherever required, after four o'clock that evening; defendant also asked for the horses, but said he was not prepared to pay for them just then; that defendant then left to get a check, and was gone fifteen or twenty minutes; on his return witness and de-

defendant went to Trinity church, but could not find the horses or carriage; that then they went to Broome street, but could not find Mr. Miner, and returned to the auction store, when witness was told Mr. Goelet's name; that he thought defendant had left before this information was obtained; defendant said he was ready to take them at that time, and gave the parties clearly to understand he wanted the horses; the defendant expressed dissatisfaction both before and after going to Broome street, that he could not ascertain where the horses were.

The referee made his report in favor of the defendant, upon the grounds that the contract of sale by the auctioneer was invalid, neither the terms of the sale, nor the name of the purchaser, nor that of the person upon whose account the sale was made, being sufficiently specified in the memorandum; and that under the pleadings the defendant had a right to insist upon these objections.

R. B. Roosevelt, for the plaintiff, now moved to set aside the report and the judgment thereon, and insisted upon the following points—

I. No evidence of a memorandum in writing is necessary. 1. The contract as laid, is admitted by the answer, and need not be proved. (*Vaupel v. Woodward*, 2 Sand. Ch. 143, 2 Paige, 177.) 2. The Statute of Frauds is not properly pleaded; no reference is made to its title, and the substance of only one branch is stated (2 R. S., 3 Ed. 195). 3. The second paragraph in the answer is inconsistent with the first, and admits the obligation (5 How. Pr. R. 15).

II. The memorandum, as proved, is sufficient. 1. It contains the "substance of the statute." (*Welford v. Beasley*, 3 Atkyn, 508; *Pugh v. Chesseldine*, 11 Ohio, 109; 13 Ves. Ch. 471.) 2. The law implies the terms to be cash. (*Cammeyer v. The United German Lutheran Churches*, 2 Sand. Ch. 240 & 243; 7 Leigh, 165.) 3. The law takes no notice of parts of a day (3 Cow. 19; 4 Coms. 418).

III. If not a sufficient memorandum, it will however still work as a note signed by the parties to it, through their agent, the auctioneer. 1. An auctioneer's clerk's signature is sufficient. (*Frost v. Hill*, 3 Wend. 386; *Coles v. Trecothick*, 9

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Ves. Jr. 234.) 2. It need not be signed, the insertion of the names being a sufficient subscribing. (*James v. Patten*, 8 Barbour Sup. 344; *McComb v. Wright*, 4 J. Ch. 659.)

IV. The defendant, by ordering the horses away, virtually took them into his possession and rendered the delivery perfect, thus obviating all necessity for a written memorandum, and making the subsequent demand of delivery a mockery. (*Vincent v. Germond*, 11 J. R. 283.)

E. S. Van Winkle, for the defendant, made and argued the following points—

I. The contract of sale was not binding—because it was a contract for the sale of goods and chattels for upwards of fifty dollars, &c., and there was no sufficient note or memorandum of the contract, without which every such contract of sale is void (2 Rev. St. 136, § 3, 4). 1. The auctioneer did not make the memorandum. An auctioneer is a public officer, his office is one of trust. He cannot delegate any fiduciary power (4 Cow. & Hill's Ph. Ev. 85). 2. The memorandum given in evidence was not made at the time of the sale. (This means *eo instanti*—simultaneous. The object being to prevent frauds and perjury.) (*Hicks v. Whitmore*, 12 Wind. 554.) 3. The memorandum made did not specify the terms of sale. No presumption that the sale was for cash can be raised, nor if raised, can it be judicially inserted in the contract. One object of the statute was to prevent such points being left to inference, presumption, or even parol testimony. (*Bailey et al. v. Ogden*, 3 Johns. R. 399; *First Baptist Church of Ithaca v. Bigelow*, 16 Wend. 28.) 4. The memorandum did not specify the name of the purchaser and the name of the person on whose account the sale was made. Goelet and Cowdrey are not distinctive names. It appears, by the evidence, that the parties did not know, and by the memorandum had no means of ascertaining who Goelet was—Goelet's name was not inserted until afterwards, until after Goelet had neglected to complete the sale, folio 32. The auctioneer's agency had then ended, and he would not bind either party by any act of his own. (*Seton v. Slade*, 7 Ves. p. 276.)

II. That defendant's agreeing that the horses might draw the carriage which had been purchased by Mr. Bergh, before he

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had paid for the horses, was not an acceptance or receipt of the horses, so as to take the case out of the statute. (*Phillips v. Bistolli*, 2 Barn. & Cress. 511.) It was no acceptance, because they were never offered to him; it was no receipt, for he never had them, and his consent that Bergh might use the horses was in law and in fact a nullity.

BY THE COURT. OAKLEY, CH. J.—There is no force in the objection, that the answer of the defendant does not expressly refer to the statute of frauds. In all cases, more especially since the code where the provisions of a public statute are relied on, as creating a right of action or a valid defence, it is sufficient for the party to set forth the facts which, he is advised, bring his case within the statutory provisions, leaving the court to determine whether they apply or not, either upon a demurrer, or upon the trial. In pleadings under the code, in which facts alone, as distinguished from conclusions of law, are proper to be stated, it may be doubted whether an express reference to a statute of which the court is bound to take notice, might not be struck out as redundant.

Nor can we say that the defendant, by the terms of his answer, is precluded from setting up the statute of frauds as a defence. The answer begins with a positive allegation that no such memorandum was made by the auctioneer, as the statute requires; and we do not think that this allegation is contradicted, or waived by the averments that follow. At any rate, as the plaintiff has taken issue upon the defence, it is too late for him now to raise the objection. Where two inconsistent defences are set up, one of them may be struck out upon motion; but when no such motion is made, the defendant may make his election upon the trial.

We pass then without further remarks to the question, whether the defence founded upon the statute of frauds is sustained by the evidence. It is not necessary to advert at all to the several defects that are alleged to exist in the auctioneer's memorandum of the sale; for, admitting that the memorandum contains all the particulars which the statute calls for, and is perfect in its form, there remains an objection to its validity, which we are constrained to believe, and must therefore say, is unanswerable and fatal.

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The second section of the second title of the statute declares that the memorandum of the auctioneer shall be made by the proper entries in his sales book "at the time of the sale," and these words the Supreme Court has decided in *Hicks v. Whitmore* (12 Wend. 554), must be strictly construed and strictly complied with. The construction which the court then adopted is, that the memorandum must be completed by the proper entries in the proper book, as soon as the goods are struck down to the purchaser, and before the auctioneer enters upon any other business or transaction whatever. This construction may seem to be rigid, but the observations of Chief Justice Savage go far to show that it corresponds with the policy of the law, and was probably necessary to carry into effect the intention of the Legislature. The Legislature did not mean that the memorandum should be in any degree an act of memory. They meant it to be an immediate record of the facts as they occurred. Had we even entertained serious doubts as to the propriety of this decision of the Supreme Court, it has remained unquestioned for so long a term of years, that we should have held ourselves bound to follow it.

In this case a partial memorandum was made at the time of the sale, but the name "Goelet," as that of the person upon whose account the sale was made, was not then entered, and until this entry was made there was no such memorandum as the statute required. The testimony leaves it doubtful whether this necessary entry was made on the same or on a subsequent day, but if made on the day of sale, it is certain that it was not until some hours after the sale was over. The memorandum produced, we are therefore forced to say, is not such a note in writing as was necessary to be proved to give validity to the contract.

It was said, however, that although the memorandum, for the reason given, or any other, may be deemed an insufficient compliance with the provisions of the statute, it may still be received as evidence of a contract binding upon the parties, and that its reception as such evidence is not forbidden by the statute. The law (we were told) is settled that an auctioneer is the agent of both the parties, and it therefore follows that any memorandum or note in writing made by him is just as

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valid as if signed by the parties themselves. It is not necessary to deny that the memorandum produced, if signed by the parties, would be sufficient evidence of a contract, but the conclusion that it is therefore sufficient to bind them in its actual state, we cannot hesitate to reject. It is drawn from false premises. The auctioneer, by virtue of his office, is not the agent of the parties, unless in the discharge of his duties, he follows the directions of the statute. He has no authority whatever to bind them by any other course of proceeding than that which the statute prescribes. The English decisions relative to the implied powers of an auctioneer as the agent of the parties, and those in our own courts, before the Revised Statutes were in force, have no application. The fourth section, upon the construction of which the question turns, is a new provision, and the precise directions which it gives, were meant to redeem the law from the uncertainty in which it was previously involved. The meaning of the statute, reading the third and fourth sections in their necessary connexion, evidently is, that every sale of goods at public auction where the price is fifty dollars or more, shall be wholly void, unless the goods are then paid for or delivered in whole or in part, or the exact memorandum which the statute describes is then made. By deciding that a defective memorandum, or one not made at the time, may be received as evidence of a valid sale, we should, so far as our own power extends, repeal the law.

The supposition that there was in this case such a virtual delivery of the horses, as, without any memorandum or note in writing, was alone sufficient to bind the contract, is plainly inconsistent with the complaint, and, we think, is contradicted by the proof. The complaint admits that there was no such delivery, and the proof shows that the admission was proper and necessary.

The motion to set aside the report of the referee is denied, and the judgment appealed from affirmed with costs.(a)

(a) The twenty-sixth section of the statute regulating sales by auctioneers (1 R. S. pp. 528, 532), which was not cited upon the argument, makes it the duty of the auctioneer, when the bargain of sale is not immediately executed, to enter on his sales book the same memorandum which the statute of frauds describes, but

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Although before the Code a judgment could not be impeached in an action at law upon the ground that it had been obtained by fraud, yet it was liable upon that ground to be impeached and set aside in a Court of Equity, and since the Code, the same facts that would formerly have entitled a defendant to be relieved in equity, may be set up in his answer as a full defence, the distinction between legal and equitable defences being wholly and wisely abolished. *Held*, that the facts set forth in the defendant's answer, if established by proof, were evidence that the judgment that was sought to be enforced had been obtained by fraud.

Held also, that the question whether these facts were true was directly at issue between the parties in the proceedings in Connecticut, and its determination necessarily involved in the judgment or decree which was then pronounced.

Also, that the Supreme Court of Connecticut, acting as a Court of Equity, had the same jurisdiction, under the Constitution of the United States, to enjoin a suit upon the judgment, as the Court of Chancery in this State. And,

Lastly, that the record of the proceedings in Connecticut being properly authenticated, ought to have been admitted as conclusive evidence of the truth of the facts upon which the judgment of the Court was founded.

(Before DUEB, CAMPBELL, and PAINÉ, JJ.)

May 16; June 26.

THIS was an action of debt on a judgment of this court, rendered on the 17th day of April, 1847, for \$612 93, in favor of James N. Olney against the defendant, and on the 11th day of September, 1850, assigned to the plaintiff. The complaint sets forth the recovery of the judgment and the assignment to plaintiff. The answer sets up as a defence, that the judgment was obtained by fraud, and without any knowledge on the part of the defendant, or any opportunity to make a defence, he being a resident of the State of Connecticut, and for an alleged cause of action, utterly groundless. That on the 8th of November, 1848, said Olney commenced an action of debt on the same judgment, in the Superior Court of Connecticut, against Pearce. That Pearce, that action being pending, commenced

in this section the words "at the time of the sale" are omitted, and it is this omission that has probably led to an erroneous practice. It does not seem, however, to furnish any reason for varying the construction of the words in the section in which they are found.—*Reporter*.

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a suit in chancery in the same court, against Olney, who appeared and answered, charging that said judgment was obtained by fraud, and praying an injunction against the prosecution of said action of debt. That by the finding, and final decree in said chancery suit, said judgment was found and decreed to be fraudulent, and an injunction granted. That after that decree, Olney assigned the judgment to the plaintiff, who commenced this suit.

The reply denied every allegation in the answer.

The cause came on for trial before the Hon. ELIJAH PAINE, one of the justices of this court, and a jury, on the 19th day of June, 1851. The plaintiff's counsel offered and read in evidence, a judgment record of the Superior Court in favor of James N. Olney against the defendant, on a judgment rendered therein on the 17th April, 1846, for the sum of \$612 93. By this record, it appeared that the *capias* by which the suit was commenced was personally served on the defendant. The plaintiff's counsel read in evidence an assignment of the said judgment by James N. Olney to the plaintiff, dated September 11th, 1850, and there rested his case. The defendant then offered in evidence an exemplified copy of the record of the proceedings in the chancery suit in Connecticut. The petition upon which the suit in chancery was founded, did not aver, as alleged in the answer, that the judgment upon which the present action was brought, was wrongfully and fraudulently proved to be entered up without the knowledge of the defendant, and which he was prevented from defending, by the deceitful practices of Olney; but the only allegations in the petition in which fraud was mentioned, were stated in language as follows:—"That Olney, by mistake or contriving, or intending to harass and defraud said petitioner, commenced suit against him," &c. "That Olney, in further pursuance of said mistake or design to defraud, caused the *capias* in said suit to be served on the petitioner." "That Olney, in further pursuance of said mistake or design to defraud, caused said suit to be returned to said court, and there further prosecuted." And at the end of these allegations was this summary:—"And so said petitioner was by mistake or design, and without any fault on his part, deprived of all opportunity to make his defence in

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said suit." The court in Connecticut did not, as the answer alleges, find the facts to be true, as they are stated in the answer, but they found them to be true as they were set forth in the petition. And finally, the court in Connecticut did not, as is alleged in the answer, "adjudge, order and decree that the judgment was fraudulent." Their whole judgment was, that "this court do now, in accordance with the advice of the Supreme Court of Errors, find the facts set forth in said petition to be true, and do therefore enjoin the said Olney, that he do for ever desist from prosecuting his said action upon said judgment, under the penalty of 1000 dollars."

The plaintiff's counsel objected to the said record as inadmissible, and the court excluded it; to which ruling, the defendant's counsel excepted. No other evidence being offered on the part of the defendant, the court directed the jury to find a verdict for the plaintiff, with interest, to which the defendant excepted. The jury accordingly found a verdict for the plaintiff, for 884 dollars 76 cents.

Asa Child, for the defendant, argued the following points—

I. It was competent for the defendant to allege what in his answer he has alleged, that the record of the judgment on which this action was founded was entered up fraudulently, and without his knowledge or suspicion, and such fraud was a valid defence to this action. 1. The proposition does not involve the inquiry, whether a fraud practised upon the court at the trial when both parties were present, and upon a matter which was passed upon by the court, could be thus alleged. 2. Nor the inquiry whether a fraud practised upon the defendant, by which at such trial he was deceived as to his defence, and which influenced the decision, could be thus alleged. 3. But it involves the position that the fraudulent entering up of a record of a judgment by the plaintiff in the absence and without the knowledge or suspicion of the defendant upon a ground of action false and fraudulent, can be alleged in answer to an action on such judgment, and is a valid defence to it (*Shumway v. Stilman*, 4 Cow. 292; *Andrews v. Montgomery*, 19 John. 162; *Harrod v. Barret*, 1 Hall, 155; *Borden v. Fitch*, 15 John. 145; 17 Conn. Rep. 530).

II. The Superior Court of Connecticut had jurisdiction of the action brought and tried there, and of the parties to it, concurrent with this court, and had a right to make the finding and judgment then made. 1. The plaintiff went into that state voluntarily, and by commencing his action, submitted to the jurisdiction of that court. 2. In the suit in chancery brought in the same court in defence of his action, the plaintiff appeared and pleaded, and submitted to the jurisdiction of the court, and was fully heard as to all the matters involved in it, and was bound by that judgment (*Wheeler v. Raymond*, 4 Cow. 311; *Andrews v. Herriot*, in Notes, 4 Cow. 520 (where the cases are collected); *Matthews v. Fletcher*, 6 Wheaton, 129; *Wells v. Duryee*, 7 Cranch, 481, 1 Sand. p. 116.)

III. The matter in issue in this cause is the precise matter which was in issue, and was submitted to the Superior Court of Connecticut, and is by the decision of that court *res adjudicata*, and the finding and judgment of that court was conclusive upon these parties as to the matter in issue, and the record should have been received and the complaint dismissed on that ground. It was conclusive as an estoppel; but if not, it was admissible as evidence to prove the issue (*Sampson v. Hart*, 1 John. Ch. R. 91; *Burt v. Sternberg*, 4 Cow. 559; *Gardner v. Bugbee*, 3 Cow. 120; 1 Stark Ev., part 2, p. 185; 1 do. do., § 59, p. 190; 1 do. do., § 66, p. 205; 1 Phil. Ev., p. 13, 212; Conflict of Laws, 538.)

IV. The plaintiff who took the assignment from Olney after the trial and decision in Connecticut, is bound by the judgment in this action in the same manner and to the same extent as if Olney was the plaintiff (1 Stark, part 2, p. 192, 193, 194; 2 Phillips Ev., p. 6, 7; Conflict of Laws, § 1299–1309, 3 Wheat. 334.)

E. Terry, for the plaintiff, argued the following points—

I. The justice on the trial properly rejected the evidence offered by the defendant as proof of the allegations set up in his answer, and in defence to the action, because—1. The decree in Connecticut offered in evidence, was by its terms only intended to operate upon a suit then pending in the state of Connecticut. 2. The said decree was not intended to ope-

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rate upon any other suit then pending, or upon any suit to be commenced in Connecticut, and the decree could have no greater force or effect in this state than it would have in the state where rendered. 3. No injunction was granted by the said decree in Connecticut, which was intended to prevent the prosecution of a suit in the state of New York. 4. It would be incompetent for the Court of Chancery of another state to enjoin against the enforcement in this state of a judgment regularly rendered by a court of competent jurisdiction of this state, on the verdict of a jury, where the defendant was personally served (*Mills v. Duryee*, 7 Cranch, 481; *Hammond v. Baker*, Code Rep. vol. 1, No. 3, p. 105; *Burrows v. Miller*, 5 Pr. Rep. 51.) 5. It does not appear whether the decree rendered in Connecticut was upon the verdict of a jury, or whether or not it was upon the defendant's own oath, or upon any oath at all (Bill of Rights, Constitution N. Y. 1846, Art. 1, § 2; 1 Gil. Ev. p. 32; 1 Greenl. Ev. § 551.)

II. The plaintiff was entitled to a verdict, and the motion for a new trial should be denied.

By THE COURT. DUER, J.—with whom *Campbell, J.*, concurred, delivered orally his opinion that a new trial ought to be granted. The grounds of this decision are those stated in the preliminary abstract.

PAINE, J., dissented, and delivered the following opinion:—On the trial of this cause, I certainly entertained and expressed a very decided opinion that the decree in Connecticut could not be used as a defence to this action. It struck me that a judgment of this court could not be impaired by anything done by a court sitting out of this state; and that to admit the decree from Connecticut as an estoppel, would be, in effect, to assent to a judgment of this court's being vacated or set aside by the courts of that state. The views which I took on the trial have not been at all changed, but rather confirmed, by the argument on appeal, and subsequent examination.

There are three objections to this Connecticut decree's being admitted as an estoppel, or indeed as evidence at all. 1st. The defence which it is offered to sustain, cannot be set up to this action. 2d. It furnishes no proof of the defence for which it is

offered ; and 3d. The decree in Connecticut is void, because it was pronounced in violation of the constitution of the United States. I will consider these objections in their order.

First : The answer sets up, that the judgment sued upon was obtained by fraudulent practices of the attorney and his client, in the course of the suit in which it was recovered, upon a claim in itself fraudulent and unfounded. The answer, therefore, would seem to impeach the judgment upon the merits, as well as upon the ground of fraudulent practice in the suit in which it was recovered. But the counsel for the defendant seemed to think that there was a distinction between a plea impeaching it upon the merits or for fraud on the trial, and a plea impeaching it for fraudulent practice in its recovery ; and defended the answer as being a plea of the latter kind ; and although I know of no such distinction for this purpose, either at law or in equity, yet I shall consider his case in the light in which he contended that it was maintainable.

The alleged fraud in the recovery of the judgment is, that the plaintiff's attorney, after his arrest, promised the defendant, who resided in Connecticut, and was here transiently, that he would not proceed with the suit without giving him notice ; that the defendant, relying upon this, made no defence ; but that the attorney, without giving him any notice, proceeded to take an inquest by default against him, and entered judgment. The question, therefore, is, whether this fraud can be set up by way of plea or answer, as a bar to an action on the judgment.

Courts of law have always upon motion exercised the most unlimited equitable powers over their own practice and proceedings. To set aside judgments or other proceedings upon motion, as irregular or fraudulent, is of such frequent occurrence, as to form a very considerable part of their business. A knowledge of their own rules and practice, and of the proceedings immediately before them, enables them to correct any irregularity or malpractice, with much greater advantage and justice, than could be done by any other tribunal, even within the same jurisdiction. It has, therefore, become an established rule, that courts within the same jurisdiction have no power, in this respect, over each other's proceedings. It is true that courts of equity of the same state do exercise a jurisdiction, on the ground

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of fraud, with respect to judgments recovered in courts of common law; but this is not done in the way of correcting, vacating, or impairing the judgment, but by arresting a party through his conscience, and restraining him from committing further fraud by any attempt to enforce the judgment.

This has always been the law of this state, and of every country living under the system of the common law. And it is still the law, unless the law, in this respect, has been changed by the alterations lately made in our courts and practice, by the constitution and Code.

The constitution has abolished courts of equity, and vested their powers in the courts of common law. But I do not imagine that it has thereby confounded the established distinctions between legal and equitable proceedings. Much less do I suppose that it has enabled courts of law, with their newly conferred equitable powers, to do what courts of equity before never did, or that it has in any manner changed in courts of law, the mode of exercising those equitable powers, which they were before in the daily habit of exercising.

Now, although courts of equity have laid hold of the consciences of parties and restrained them from enforcing fraudulent judgments, when their aid has been directly invoked for that purpose upon a suitable case presented to them, yet I am not aware that they have ever allowed a judgment to be impeached upon the ground of fraud, when their aid has been sought to enforce it. To take the familiar case of a creditor's bill, brought to have execution of a judgment, has a defence ever been allowed to such a bill, that the judgment was obtained by fraud? I think it never has been, and that, upon principle, it never could be done.

Whatever equitable powers, then, the constitution has conferred upon courts of law, it has not made that a defence, which would not before have been a defence in a court of equity. For it has merely transferred to the former the powers and jurisdiction of the latter. I think it will hardly be contended, that the constitution, by making this transfer, has in any respect changed the systems of equity and common law, as they before existed, or the modes of proceeding.

The changes introduced by the Code, however, are of a

different character. By abolishing all distinctions between actions at law and suits in equity, and the forms of all such actions and suits, and all the forms of pleading heretofore existing, it has caused not a little trouble and perplexity among the profession, on the subject of pleading. This has been still further increased by that provision which directs, that issues of fact, in actions for the recovery of money only, or of specific real or personal property, shall be tried by a jury, and all other issues by the court. Formerly, all issues in equity were tried by the court, unless the court ordered a trial by jury; but by our present practice many of those issues must be tried by a jury. A still greater difficulty occurs in actions for the recovery of money, or specific real or personal property, where a defence is set up which was formerly of exclusively equitable cognisance; for the Code has made no special provision for such a case. But it may be doubted whether rights, which were formerly of exclusively equitable cognisance, and which now, if attempted to be asserted by action, must be tried by the court, can, if set up as matters of defence, be tried by a jury.

It is to this state of doubt and uncertainty, consequent upon so entire a change, that we are probably indebted for the defence set up in this action. Such a defence, before the Code, would never have been thought of by the learned counsel who drew the answer in this action. It is not strange, that after the destruction of all our old guides in practice and pleading, such a defence should be attempted; but unless we are to consider the established principles, as well as the forms of law, as having been subverted by the Code, I cannot think that such a defence can be maintained.

Before the Code, the only defence which could have been pleaded in this action, would have been *nul tiel record*. *Nil debet*, or any defence upon the merits, or which went to question the conclusiveness of the record, would have been entirely inadmissible. The only issue to be tried, the issue of *nul tiel record*, would have been tried by the court. The record being in this court, the court would have tried it by inspection, and no other evidence on the part of the plaintiff or defendant could have been offered.

These were the rules of pleading and trial before the Code,

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and I am not aware that the Code has altered them. The Code has abolished the forms of pleading, but it has not abolished all the rules of pleading, nor the principles of law; nor has it made that a defence, which before would not have been a defence, either at law or in equity. It has not abolished the principles, that rights secured by a judgment cannot be contested; that the evidence furnished by the record of such judgment cannot be controverted; and that on producing the record the plaintiff is entitled to judgment. Nor has it abolished or altered the rule of pleading, that in an action on such judgment nothing can be pleaded except *nul tiel record*, or that there is no such record. For this rule is only a corollary from the legal principles I have just referred to. The judgment being final and conclusive, it necessarily follows that the law will allow the defendant only to deny its existence, but not to question its force or resist its operation.

If the defendant wished to impeach this judgment for the alleged fraud, his obviously proper course was, to apply to the court, by motion, to have it set aside. There has never been any other mode of doing it, and there can, in the nature of things, be no other mode now. If the judgment was recovered by fraud, it should be set aside, and the subject matter of it should be tried over again; if it was not recovered by fraud, it should remain undisturbed, and a new trial ought not to be had. Before a second trial, therefore, this question of fraud must be settled.

Suppose it were otherwise, and that the defendant is right in attempting, as he does, to bring all these matters, both the question of fraud and the rights of the parties upon the merits of the case itself, to trial before a jury at the same time, what would be the state of things presented on the trial? If the judgment was recovered unfairly, the whole matter should be tried over again by evidence independent of the judgment, and the judgment should not be used as evidence. If recovered fairly, then no other evidence than the judgment should be admitted. And this view is not affected by the fact that in this case there is a judgment record which is, as is alleged, conclusive evidence of the fraud, and therefore the fraud is established; for in other cases the same defence of unfairly

recovering the judgment may be set up, without a record to furnish conclusive evidence of it. And then, is the plaintiff to use his judgment as evidence, or not? How is this to be determined? There are two things to be tried; the fairness of the recovery of the judgment, and whether the judgment is right in itself. If the first should be determined in favor of the plaintiff, then all he has to do is to produce his judgment to prove his title to recover, and the defendant could not controvert it. But, if determined against him, he must resort to other evidence subject to be contradicted by the defendant. Now, how is it to be ascertained which course is to be taken? Is the jury to go out and pass upon the question of fraud, and then come back and try the case upon the merits? Such an arrangement would certainly betoken progress enough to satisfy any one.

If this trial had taken place, the attitude of the parties towards each other would have illustrated the inconsistency of the whole proceeding, and the utter confusion of ideas involved in it. The parties would have been armed with estoppels point to point—estoppel against estoppel. The defendant would have said, my estoppel shows that your judgment was fraudulently recovered. The plaintiff would have replied, that is no matter; my estoppel shows that you owe me the debt; that it is all right upon the merits; and to try the cause over again could do you no good, for in any event the court must render judgment in my favor. My judgment imports absolute verity as well as yours. What then is the state of the proof? That a righteous judgment has been recovered by unfair means. Would it be worthy the serious occupation of a court of justice to allow such a trial to proceed further?

Secondly: none of the allegations of the answer are supported or proved by the record offered in evidence. The answer sets up fraud in the recovery of the judgment, and that only as a defence. It says nothing about its having been recovered through any mistake. It also alleges that the petition in chancery presented to the court in Connecticut stated the judgment to have been fraudulently recovered, and that the court found the facts stated in the petition to be true, as alleged in the answer, and adjudged and decreed that said

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judgment was fraudulently recovered. Now, so far from this being true, the petition stated no such thing, and the court neither found nor decreed anything of the kind. The only statements of the kind in the petition are, that Olney by mistake, or contriving and intending to harass and defraud the defendant, commenced his suit in this court; that in further pursuance of said mistake or design to defraud, he caused the *capias* to be issued; and that in further pursuance of said mistake or design to defraud he caused the suit to be returned to this court, and further prosecuted;—and that so said defendant was, by mistake or design, deprived of all opportunity to make his defence.

The entire difference between the statements of the petition as set forth in the answer, and the statements actually made by the petition, is too obvious to require comment. The petition does not allege fraud, but either mistake or fraud; and the court finds nothing except that the facts set forth in the petition are true—certainly this is no finding of fraud. If it is a finding of anything, it is a finding of mistake or fraud. It is therefore impossible to tell which of the two the court intended to find. The plaintiff has as much right to say that it is a finding only of mistake, as the defendant has to say it is a finding of fraud.

Finally, the court did not decree that the judgment was fraudulent, but simply decreed an injunction restraining the plaintiff from prosecuting his action upon it. The record, therefore, introduced by the defendant on the trial to prove his plea, failed to prove it in every particular.

Thirdly: The decree in Connecticut was pronounced in violation of the Constitution of the United States, and of the Act of Congress in pursuance made of it.

The Constitution provides that “full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state;” and authorizes Congress to “prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.” The Act of Congress of 26th of May, 1790 (Ch. 11), after providing for the mode of authenticating the acts, records, and judicial proceedings of the states, declares, that “the said records and judicial proceedings, authenticated as aforesaid, shall have such faith

and credit given to them, in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken."

In several particulars, these provisions of the Constitution and Act of Congress have been much contested in various states of the Union. The principal question has been whether a judgment recovered in a court having no jurisdiction of the person by the service of process was within these provisions. In discussing this question in the earlier cases, the just distinction between foreign judgments and judgments of states of the Union was by no means as clearly understood as it is now; and the courts manifested a disinclination to make any such distinction, and when compelled to do so, retraced their steps with reluctance (*Starbuck v. Murray*, 5 Wend. 155).

Anterior to and contemporaneously with this discussion, the question whether the merits of foreign judgments could be inquired into was much agitated in England, and a variety of opinions were entertained about it. Some of the earlier cases denied, while others maintained, that they could be. Some of the judges thought that such judgments were only *prima facie* evidence, and that the defendant could show them to be wrong upon any ground; while others contended that they should be allowed to be impeached upon two grounds only—viz. a want of jurisdiction, and fraud—and not generally upon the merits. This last view, after a long discussion and opposite opinions, seems to have been adopted by the courts of England as the correct one. The light of this discussion, which in truth does not reach the subject as it exists under our constitution, seems to have guided our courts when the subject of state judgments came first under their consideration; and although a case never arose or has since arisen in any court where a state judgment was attempted to be impeached for fraud, yet when the legitimate ground of a want of jurisdiction was set up in some few of the earlier cases, the courts threw out *dicta*, entirely *obiter*, that such judgments might be impeached for want of jurisdiction, or fraud; thus adopting and applying to state judgments the rule then urged and since applied in England, as the true rule in relation to merely foreign judgments.

The true constitutional rule having become better understood,

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and the courts generally having got over their reluctance to adopt it, where such reluctance existed, the later and better considered cases will be searched in vain for any such *dicta*. Not a word about fraud is to be found in the following cases, but only about a want of jurisdiction: *Aldrich v. Kinney*, 4 Conn. R. 380; *Wood v. Watkinson*, 17 Conn. R. 500; *Bissel v. Briggs*, 9 Mass. R. 462; *Jacobs v. Hull*, 12 Mass. R. 25; *Kilburn v. Woodworth*, 5 J. R. 41; *Robinson v. Ward*, 8 J. R. 86; *Dennison v. Hyde*, 6 Conn. R. 508; *M' Rae v. Mattoon*, 18 Pick. R. 53; *Moren v. Killibrew*, 2 Yerg. R. 376; *Gleason v. Dodd*, 4 Metcalf, R. 333; *Hall v. Williams*, 6 Pick. R. 239; *Read v. Pratt*, 2 Hill, R. 64; *Starbuck v. Murray*, 5 Wend. R. 158; *Shumway v. Stillman*, 6 Wend. R. 447.

As I understand the rule now established in relation to state judgments, it is this: If there is a judgment, it cannot be inquired into for any cause whatever; and, although there may have been fraud in its recovery, it is still a judgment, and not void. But if the court rendering it had no jurisdiction of the person, then there is no judgment, and the constitution of the United States does not apply. In my opinion, not an adjudged case, except the one we are considering from Connecticut, can be found against this rule as I have stated it; while many of the very highest authority can be cited in its favor.

Chief Justice Parsons, of Massachusetts, has the merit of having laid down the rule correctly, even before it was settled by the Supreme Court of the United States. In *Bissel v. Briggs* (9 Mass. R. 462), he enters into a most elaborate consideration of the whole subject, discusses in its fullest extent the difference between foreign and state judgments, and concludes by saying: "Such judgments, so far as the court rendering them had jurisdiction, are to have in our courts full faith and credit." "The defendant Briggs must be considered as a party to a judgment rendered against him by a court which had jurisdiction of the cause, and of the parties to it. He cannot therefore, in my opinion, be admitted by evidence to impeach that judgment, or to deny it, or in any manner to derogate from the full faith and credit to which it is entitled."

In *Starbuck v. Murray* (5 Wend. 158), the court say, "If the jurisdiction of the court is not impeached, it has the character

of a record, and for all purposes should receive full faith and credit."

In *Moren v. Killibrew* (2 Yerg. R. 376), the court of Tennessee presents the distinction which governs these cases in a very lucid manner. The action was on a judgment from Kentucky, and the court says: "We must advert to the distinction between void and voidable, between a judgment that is irregular or erroneous, and one that is void or a nullity. The one is valid to some extent; the other is valid to no extent. Irregular and erroneous judgments are valid and good until set aside or reversed on error. Void judgments, or such as are a nullity, have no operation whatever. If the judgment of the sister state now in question is of the first class, it is evident that the courts of this state cannot give relief to the defendant, as that relief is in its nature limited to the court where the judgment was rendered, or to the revising courts of the State of Kentucky. This court confines itself within that narrow limit of inquiry, incidental from necessity to all courts which are called upon to enforce and carry into effect the judgment of some other court. That limit is an inquiry into the jurisdiction of the court rendering the judgment sought to be enforced."

And the courts have gone so far as to hold, that even a mistake in making up the record could not be shown; so entirely obedient and unquestioning is the faith which is required by the constitution. In *Hall v. Williams* (6 Pick. R. 239), the court says: "If it appear by the record of a judgment of a sister state, that the defendants had notice of the suit, we are inclined to think it cannot be gainsaid. For, as we are bound to give full faith and credit to the record, the facts stated in it must be taken to be true judicially; and if they should be untrue, by reason of mistake or otherwise, the aggrieved party must resort to the authorities where the judgment was rendered for redress." A similar opinion was intimated in *Reed v. Pratt* (2 Hill R. 66), and *Bicknell v. Field* (8 Paige, 440); but this particular point can hardly be considered settled.

The case of *M^r Rae v. Matoon* (13 Pick. R. 53) is directly in point for our purpose. In that case, under a plea of *nil debet* to an action on a judgment of a court of North Carolina, the defendant, on the trial, was permitted to show that the

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judgment was recovered by fraud; the plaintiff's attorney having stated that the action had been discontinued; and upon this issue the jury found a verdict for the defendant. The court however set aside the verdict, saying: "The question is in substance, whether the defendant may prove under this issue, that the judgment was obtained by fraud and misrepresentation. We are entirely satisfied, that while the judgment remains apparently in full force, the defence cannot be made against it. If this were not so, there would be no end of litigation. If the first judgment were thus to be rendered void, the second is liable to the same allegation, and the third, and so on. The law would become a game of fraud, in which the greatest rogue would become the most successful player. If any proceedings have taken place in the court in North Carolina which would avoid the judgment obtained against the defendant, the application must be made to the judicial courts there. But so long as the judgment remains in full force the courts in Massachusetts cannot go behind it." Clearly, either this case is not law, or the decree in Connecticut is unconstitutional. It will be observed, that no technical objection is set up on the ground that a court of law could not entertain the defence of fraud. The reasoning of the court is, that no court of a sister state can entertain it (and see *Bicknell v. Field*, 8 Paige's R. 440).

But it is necessary that I should notice the grounds upon which the decree is sustained by the Court of Errors of Connecticut, as those grounds are stated in their opinion.

One ground is, that the proceeding in Connecticut was not "an attempt to impeach the New York judgment." And the court says: "In granting an injunction against proceedings at law, whether in a foreign or domestic court, there is no difference; the court of equity does not presume to direct or control the court of law; but it considers the equities between the parties, and acts upon the person, and restrains him from instituting and prosecuting an action" (*Pearce v. Olney*, 20 Conn. R. 554).

I am unable to assent to this reasoning. In the first place, it assumes, that under the Constitution of the United States, there is no difference between a court of equity in New York,

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restraining a party from proceeding in New York to enforce a judgment of a court of New York, and a court of equity in Connecticut restraining him from proceeding upon it in Connecticut. There is this difference at least, that the constitution cannot apply to the former case, while it may well be contended that it does apply expressly to the latter. This is a naked assumption of the court, for which no reasons are given, and in support of which no authorities are cited. I shall endeavor to show that it cannot be supported either by reason or authority.

Both before and since the case of *Mills v. Duryea*, there has been a looseness in the language employed, in speaking of the effect to be given to judgment, under the constitution and act of Congress. It is sometimes said the courts of Massachusetts are bound to give the same effect to a New York judgment that the courts of New York would give to it. But this is not the language nor meaning of the constitution and act of Congress. Their language and meaning are, that it shall have the same effect as in the court where it was recovered; or to take the present case as an instance, that it shall have the same effect in Connecticut as it has in the Superior Court of New York, and not in a court of equity of the State of New York.

This is very clear from the language of the act. "The said records and judicial proceedings shall have such faith and credit given to them, in every court within the United States, as they have, by law or usage, in the courts of the states from whence the said records are or shall be taken." In this sentence, the word "taken," at its close, does not relate to the antecedent word "states," but to the word "courts." Records are said to be taken from courts, but could not with any propriety be said to be taken from a state. If the mere act of transportation had been meant, the word "brought" would have been used. But a record cannot be taken from "courts" or from more than one court. The plural "courts" was used merely because the plural "records" was used before and after; but the same meaning would have been expressed by the words, "as in the court of the state from whence said record is or shall be taken."

The interpretation which I have put upon the act is fully

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sustained by the construction given to it in *Mills v. Duryea* (7 Cranch R. 481); which case must be regarded upon this subject as the supreme law of the land. In that case, Mr. J. Story, in delivering the opinion of the court, immediately after quoting the act *in hæc verba* at length, says: "The act declares that the record, duly authenticated, shall have such faith and credit as it has in the state court from whence it was taken."

That this construction given to the act by the court was not a careless or unintentional one, is very clear from Mr. J. Story's Commentaries on the Constitution (vol. 3, p. 183), one of the most carefully written of his works. There again, after quoting the whole act, he says: "It has been settled upon solemn argument, that this enactment gives records the same faith and credit as they have in the state court from which they are taken."

If this be the true construction of the act, I suppose it disposes of the question; for it will hardly be contended that our court gives the same effect to one of its own judgments, that the court in Connecticut considered that they had given to it.

We have very high authority in our own state for saying that the proceeding in Connecticut was unconstitutional, and would not have been entertained by our own court of chancery. Considering the exclusive devotion of our court to chancery learning and practice, this may perhaps be considered as high authority as that of the court of errors of Connecticut upon such a subject. In *Bicknell v. Field* (8 Paige, 440), Chancellor Walworth, where an action was brought upon a judgment of a court of Massachusetts, in the Supreme Court of this state, and a bill was filed in the court of chancery to restrain the suit, declared that the provision of the Constitution was as binding upon the court of chancery as upon the Supreme Court. And he added; "It is at least doubtful, however, whether any court in this state has any right or power to inquire into the regularity of a judgment recovered in one of the superior courts of a sister state, after a personal service of the process upon the party against whom such judgment was obtained. And it certainly would not be giving full faith and credit to the record of a judgment in a sister state

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if the party against whom that judgment purported to have been obtained were permitted to allege and show, in the courts of another state, that no such judgment was in fact given, or authorized to be entered by the court; but that the judgment record was made up and filed fraudulently by the clerk of the court without authority."

Upon the whole I am of opinion that the judgment for the plaintiff ought to be affirmed.

ISAAC MOSES, Adm'r, &c. and THOMAS PERCIVAL, plaintiffs, v.
The SUN MUTUAL INSURANCE Co. defendants.

The words of the general clause in a policy of insurance do not cover all losses that may happen to the property insured during the pendency of the risks. They are restricted to losses of a similar nature, and resulting from similar causes as those specially enumerated.

Hence they do not cover a loss resulting from the consumption of cargo by the crew or passengers, or from a sale to defray the expenses of necessary repairs. It is the duty of the ship-owner to provide funds to meet all contingent necessary expenses at each port of destination, and if he fail to do so, he alone is responsible to the shipper for a loss resulting from his neglect.

The sea-worthiness of the ship is a condition precedent to the attaching of the policy; hence some proof of its fulfilment must, in all cases, be given, in the first instance, by the assured. Its fulfilment is not a presumption of law casting the burden of proof upon the underwriter.

Judgment of nonsuit affirmed with costs.

(Before DUEK, CAMPBELL, & BOSWORTH, J.J.)

Oct. 11; 30, 1852.

APPEAL from a judgment at special term, dismissing the complaint—heard upon a bill of exceptions.

The action was on a valued policy of insurance upon goods on board the ship *Mason*, on a voyage from Philadelphia to San Francisco, and that the application of the evidence, the points raised, and the opinion of the court may be properly understood, it is deemed proper to state the complaint *in extenso*. It is as follows:

The complaint of the plaintiffs shows that, on the twentieth day of February, one thousand eight hundred and forty-nine, the above named Joseph Flemming, now deceased, was a mer-

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chant in the city of Philadelphia, using trade and commerce under the name and style of Flemming & Marshall, he being, in truth, the sole and only person composing said firm; that he, the said Flemming, and the above-named plaintiff, Thomas C. Percival, were jointly interested in certain goods, wares, and merchandise, to wit, eight hundred and forty-six packages of merchandise of large value, to wit, of the value of twenty thousand dollars, and they, being such owners, did, on said day, ship and lade the same on board the good ship called the "Mason," then lying at anchor in the port of Philadelphia, and bound for San Francisco, in California.

And the said plaintiffs further show, that they, the said Flemming and Percival, did thereupon, on the twenty-fourth day of February aforesaid, cause the said goods, wares, and merchandise to be duly insured by the defendants on the voyage aforesaid, at a premium of three per cent., paid to the defendants by the said Joseph Flemming and Thomas C. Percival on the said goods, which were for the purposes of such insurance valued at sixteen thousand dollars.

And the plaintiffs further show, that in consideration of the sum of four hundred and eighty dollars, by the said plaintiffs paid to the said defendants, being said per centage, the said defendants did execute and deliver to the said Flemming and Percival, a certain instrument in writing, commonly called a policy of insurance, bearing date the twenty-fourth day of February, one thousand eight hundred and forty-nine, whereby the said defendants, in consideration of said sum of money so paid to them as aforesaid, being three per cent. on sixteen thousand dollars, the estimated value of said goods, wares, and merchandise, did insure the said joint owners of said goods, wares, and merchandise, under the name of Flemming & Marshall, on account of whom it might concern, loss payable to them, lost or not lost, at and from Philadelphia to San Francisco, with the privilege of intermediate ports, on merchandise as per memorandum on file in the office of said defendants (in case of claim for damage, the same to be settled on the principle of a salvage loss), laden or to be laden on board the good ship "Mason." Beginning the adventure upon the said goods, wares, and merchandise from, and immediately following,

the lading thereof on board of the said vessel, and so continue and endure until the said goods, wares, and merchandise should be safely landed at San Francisco, aforesaid, the said vessel in her voyage to have the right also to proceed and sail to, touch and stay at, any port or place, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to said insurance.

And the said plaintiffs aver that the said goods, wares, and merchandise, so laden on board said ship, and so insured as aforesaid, were therein valued at, and were of the value of sixteen thousand dollars. *And the said plaintiffs further show, that the adventures and perils which the said defendants took upon themselves in that voyage, in relation to said goods, wares, and merchandise, wear of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mark and countermark, surprisals, takings at sea, arrests, restraints, and detainerments of all kings, princes, or people, of what nation, condition, or quality soever, barratry of the master and mariners, and all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the said goods, wares, and merchandise; or any part thereof, during said voyage; and in case of loss, it was agreed that such loss to be paid in thirty days after proof of loss and interest.*

And the said plaintiffs further show, that at the time of the shipment of said goods, and at the time of said insurance, and at the time of the loss hereinafter mentioned, the said Joseph Flemming, now deceased, and the said Thomas C. Percival were the sole and only owners thereof; and they also aver, that since the making of said insurance, the said Joseph Flemming has departed this life, having first previously made his last will and testament. Plaintiffs further aver, that administration, with the will annexed, of all the goods and chattels of said Joseph, has been duly granted to the above-named Isaac Moses, by the Surrogate of the city and county of New York, to whom the granting thereof belonged, by reason whereof the interest of said Joseph Flemming, deceased, in said goods, wares, and merchandise, is vested in the said Isaac Moses as administrator, as aforesaid.

And the plaintiffs further show, that the said ship "Mason,"

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with said goods, wares, and merchandise, laden on board of her, did afterwards, to wit, on the twenty-fourth day of February aforesaid, proceed and sail on said voyage so insured, being in all things seaworthy.

And the said plaintiffs further show, that the said voyage insured, from Philadelphia to San Francisco, is a voyage of many thousand miles, making it necessary to stop at many intermediate ports, for provisions and refreshments, and that Rio de Janeiro is one of such intermediate ports in said voyage, to which the privilege of said ship or vessel, touching and staying for the purposes aforesaid, extends.

And the plaintiffs further show, that on her voyage, and before her arrival at said port of Rio de Janeiro, from the necessary contingencies growing out of so long a voyage, and the transition of said vessel through various climates, her provisions spoiled and failed; and to support the lives of the passengers and crew, and thereby enable said vessel to reach her final port in safety, it became necessary to consume and use, and there was consumed and used on board said vessel, a large portion of the provisions, goods, and merchandise of the said plaintiffs, so laden on board of said ship, on such adventure, and insured as aforesaid, and covered by said policy, being of great value, to wit, of the value of five thousand dollars, and which thereby, and by reason of the mere perils of the voyage aforesaid, and the seas, were totally lost to said plaintiffs.

And the said plaintiffs further show, that it was necessary to refit and repair said vessel, and replenish her stores at said port of Rio de Janeiro, to enable her to reach her destination, and perform in safety said voyage, so insured as aforesaid, and that she was there so refitted and repaired as aforesaid. And that after said vessel had been so refitted and repaired, the agent of the owner of said ship refused to pay for the same, as he was bound to do, and that it thereby became necessary, to enable said vessel to proceed on said voyage, and on account of the great distance of the owners from said port, for the master of said vessel to sell and dispose, and he did sell and dispose of a large portion of the remaining goods, wares, and merchandise of said plaintiffs, of large value, to wit, of the value of other four thousand dollars, which became thereby totally lost to the said plaintiffs.

And the said plaintiffs further show, that a certain other large portion of the goods, wares, and merchandise so shipped by them, and laden as aforesaid, on board said vessel on said voyage, and so insured by said defendants as aforesaid, amounting in value to other four thousand dollars, was entirely lost to the said plaintiffs by the barratry of the master and mariners of said vessel, during said voyage, and before she reached the port of her destination as aforesaid, San Francisco, where the same, by the terms of the bill of lading, were to have been delivered, and until which time they were insured by the defendants as aforesaid.

And the plaintiffs further show, that Valparaiso is another port in said voyage, and among the privileged ports to which said vessel was allowed by said policy to proceed, for necessary supplies, repairs, &c., during said voyage, which port is also a very distant port, being many thousand miles distant from the port of Philadelphia, as aforesaid. That said vessel repaired and refitted at said port; but that shortly after her departure therefrom, on her said voyage, her provisions were found to have become, from the climate, and other causes, unfit to sustain life; and thereupon, while on the high seas, at a distance from all ports, and for the support of human life, and from the perils of the seas, the master of said vessel was compelled to use another large portion of the goods, wares, merchandise, and provisions shipped as aforesaid, by said plaintiffs, on said voyage, and so insured as aforesaid, by said defendants, and covered by said policy. And the said plaintiffs aver, that said last mentioned goods, wares, and merchandise amount to the further sum of four thousand dollars, and were, by reason of the premises, totally lost to the said plaintiffs.

And the said plaintiffs aver, that due proof of interest by the plaintiffs in said goods, wares, and merchandise, and of the loss aforesaid, was made to said defendants, pursuant to the terms of said policy, and although thirty days elapsed thereafter, and before the commencement of this suit, the said defendants did not pay the amount of said loss to the said plaintiffs, nor any part thereof, pursuant to the terms of the policy of insurance, and their obligation and undertaking as aforesaid.

The said plaintiffs therefore say, that they have lost the said

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goods, wares, and merchandise by the perils aforesaid, and that the same amount in value to the sum of sixteen thousand dollars, which they demand herein, as their damages against the said defendants.

The answer admitted the execution and contents of the policy, and put at issue all other material allegations in the complaint.

The issues were tried before Mr. Justice PAINE and a jury, in the month of February, 1852. The facts of the case, as established by the evidence, are as follows: The ship *Mason* with the goods insured on board, in which the interest of the plaintiffs, as alleged in the complaint, was fully proved, sailed from Philadelphia on the voyage insured in the month of February, 1849. She had a full cargo, and more than 100 passengers.

Before the ship had been more than nineteen days at sea the passengers and crew were put upon a half allowance of water, and before her arrival at Rio Janeiro certain articles, part of the goods insured, principally cheese and white sugar, were broached and supplied to the ship's use, the necessity for such use arising from a deficiency in the stores properly belonging to the ship. After her arrival at Rio Janeiro the captain purchased some provisions and small stores, also a large quantity of ropes for overhauling and repairing the rigging, and a quantity of canvas for the sails. The captain, having no funds of his own or of his owners to meet these disbursements, was under the necessity of selling cargo for that purpose, and accordingly sold among other articles a number of barrels of beef, pork, and hams, covered by the policy. During the voyage from Rio to Valparaiso, and also from Valparaiso to San Francisco, the ship's stores again failed, and a large quantity of the provisions insured were from necessity used and consumed by the passengers and crew, several of the witnesses swearing that but for such use those on board must have starved. The whole amount of the losses thus occasioned which the plaintiffs desired to recover was stated to be \$4,162 $\frac{71}{100}$, with interest from the time of presenting the preliminary proofs.

The voyage from Philadelphia to San Francisco is in length 17,000 or 18,000 miles, and it was proved to be customary, and

in most cases necessary, for vessels engaged on the voyage to stop at the intermediate ports of Rio and Valparaíso for refreshments and supplies.

When the counsel for the plaintiffs rested their case the counsel for the defendants, upon the following grounds, moved for a non-suit. First—On the ground of the insufficiency of the preliminary proofs. Secondly—On the ground that, irrespective of the allegation of barratry, there was no ground of action for a loss by the perils insured against, set forth in the complaint, that the remedy for the alleged loss, if any, was against the ship and owners, and that no proof of barratry had been offered. And thirdly—That it had not been shown, that the vessel was seaworthy when she sailed, nor had she been kept seaworthy on the voyage; and that the alleged loss was the direct consequence of such unseaworthiness. Fourthly—On the ground that there was a misjoinder of parties, plaintiffs in this suit.

The judge thereupon ruled that the plaintiffs were not entitled to recover, and ordered a nonsuit.

To which ruling the plaintiffs excepted.

John Anthon, for the plaintiffs, in moving for a new trial upon the exception, made and argued the following points—

I. The preliminary proofs fully established the loss as averred in the complaint, and were sufficient, if such loss was covered by the policy.

II. The trade to San Francisco, being a new trade, and peculiar in its character, and exposed to novel risks, calls for a liberal interpretation of the policy, and especially of the general clause, to embrace such risks.

III. The complaint avoids the difficulties which have arisen heretofore on the pleadings under that clause, by setting forth especially the precise character of the loss, *in extenso*.

IV. The loss, as set forth in the complaint, is as follows:—

1. A consumption, from necessity, by passengers and crew, of a part of the plaintiffs' cargo (being provisions), to support life, and enable the ship to reach her destination; her provisions having spoiled and failed by passing through various

climates, and from contingencies attending a voyage of many thousand miles.

2. A sale, from necessity, of another portion of the plaintiffs' cargo, to enable the master to refit and repair the vessel, and replenish her stores at a remote port, the agent of the owners having refused to pay for the same, and such refitting and replenishing being necessary to enable her to reach her destination in safety.

3. The loss of another portion of the plaintiffs' cargo, insured, by the barratry of the master and mariners.

4. That after her departure from an intermediate and distant port, where she had stopped to refit by permission in the policy, her provisions, from the influence of the climate, became unfit for the support of life, and another portion of the plaintiffs' cargo, from necessity, and to preserve life, having been used by the vessel, thus making a further loss.

V. These losses are within the perils insured against, and especially covered by the general clause, "all other perils, losses, &c.," and were fully proved as laid.

VI. The proper interpretation of that clause is still an open question, and although some English and American judges and authors have confined it to losses "*ejusdem generis*" with those in the sentence preceding it in the policy, such construction is not authorized legally nor grammatically, and is at variance with the interpretation of all other commercial countries.

VII. The clause is clearly cumulative, and embraces all risks of every kind or character not before expressed, and which might in any way attend the adventure. To confine it to losses "*ejusdem generis*," would obliterate it, inasmuch as a liberal interpretation of the preceding clause manifestly embraces such losses already.

"The extent and meaning of the general words, 'all other perils, &c.,' has not yet been the immediate subject of any judicial construction in our courts of law." *Ld. Ellenborough*; *Cullen v. Butler*, 5 M. & S. 463 (1816).

Where, besides the risks in a printed policy, there was a written clause "against all risks," this was held to protect the insured from all losses, except such as might arise from the

fraudulent acts of the master. (*Goin v. Knox*, 1 John. Cases, 337; *Skidmore v. Skidmore*, 2 John. Cases, 76; Phil. Ins. (2d ed.) 688, 689.)

General clauses are to be taken generally. They embrace all that can be comprised therein. A general provision is as effective in generals, as a special one in particulars. A general agreement is to be interpreted in its generality. The contracting parties are to impute to themselves the inconvenience of not having affixed any restrictions. These rules are taught by all our doctors. (Meredith's Emerig. 48.)

If the party who could and should have explained himself clearly and precisely has not done so, it is so much the worse for him, but he cannot be permitted subsequently to avail himself of restrictions which he has not expressed.

To give more energy and extent to the clauses, it is added that the insurers place themselves in the very room and stead of the assured, as if there was no assurer; *i. e.* in case of loss the adventure shall be presumed to have been made for their account. (Meredith's Emerig. 287.)

"Perils of the seas," embrace every loss or damage which happens on the sea or through the sea. (Targa Pothier, *Ib.*)

It is only to prevent doubt and vain disputes, that in the printed form these clauses "all other, &c.," are inserted. (*Ib.*)

Emerigon then gives extracts from the policies of various commercial countries, containing the clause "all other, &c.," in various forms, but all conveying the same meaning, that the intent is to cover any kind of loss to which the adventure is exposed. (Meredith's Emer. p. 287.) A full chapter on this head.

VIII. The practical application of the rule in England (so far as any rule has been applied there), while it purports to act upon the phrase, "*ejusdem generis*," does in fact conform to the extended interpretation of the clause as practised in other commercial countries.

A Slaver: Captain missed his way to Jamaica, water failed, and slaves thrown overboard to save the lives of the remainder. A loss within the general clause. (*Gregson v. Gilbert*, 1 Park. 138; 23 Geo. 3.)

A Slaver: Failure of provisions occasioned by the unusual

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length of the voyage and bad and stormy weather, and consequent loss of slaves by death.

This would have been a loss within the policy but for the stat. 30 Geo. 3. (*Tatham v. Hodgson*, 6 D. & E. 656.)

A ship sunk at sea by another firing into her by mistake, deeming her an enemy, a loss within the general clause "all other, &c." (*Cullen v. Butler*, 5 M. & S. 461.)

To prevent money from falling into the hands of an enemy it was thrown overboard, held a loss of the nature of jettison, and within the general clause. (*Butler v. Wildman*, 3 B. & Ald. 398—1820.)

Insurance on freight. Ship placed in dry dock for repairs, lost while being got out of dock, goods purchased but not shipped.

It was insisted that the loss was not within the policy, that all other perils meant those *ejusdem generis*, as perils of the seas, &c., and did not extend to losses in dry dock from ignorance of Hindoos.

TINDAL, C. J.—The words in the policy are very large; the policy not only enumerates perils of the seas, but "all other perils, losses, and misfortunes."

The difficulty which has arisen on this clause has rather turned on the question whether such a loss was properly described in the declaration as a loss by the perils of the seas, than to any doubt as to its falling within the general terms of the policy. The difficulty here is avoided by the manner in which the loss is described. (*Devaux v. L'Anson*, 7 Scott, 507; S. C. 5 Bing. N. C. 519; Ann. 1839.)

IX. The loss in this case is so set forth in the complaint as to give the plaintiffs the full benefit of the policy.

X. If the *ejusdem generis* is the rule of interpretation, then the conduct of the passengers (a species of *vis major*), which the captain could not control, might be interpreted to be an embezzling of the cargo, and of the nature of barratry.

XI. The question of seaworthiness was for the jury. On this head, independent of the general rule that seaworthiness is implied until the contrary is proved, the testimony of the mate was conclusive to show that she was seaworthy at her

departure. The wasting of provisions and water by the passengers would be at the risk of the insurers.

XII. The judge erred in taking the case from the jury.

Hiram Ketchum, contra, insisted that none of the losses claimed were covered by the insurance, and that it was a necessary conclusion from the testimony that the ship was unseaworthy when she commenced her voyage.

By THE COURT. DUER, J.—This is a very plain case. If we follow the established, and hitherto undoubted, construction of the policy, we are bound to say that it covers none of the losses for which an indemnity is now claimed, and that the learned judge who tried the cause would have committed a grave error had he refused to nonsuit the plaintiffs.

That the losses claimed cannot be referred to any of the particular risks which the policy enumerates is exceedingly clear, for the supposition, that they may be imputed to the barratry of the master and crew, we reject, as manifestly groundless. There is not the slightest proof of the embezzlement charged in the complaint, and it would be monstrous to say that the master was guilty of barratry in not withholding from the passengers the necessary means of preserving their lives. The barratry of the master is, according to the definition of Lord Ellenborough in *Earle v. Rowcroft* (8 East. 139), a criminal breach of his duty towards his owners; and to apply the term criminal to the conduct of the master, in the case before us, would be an abuse of language and a perversion of truth. The consumption of the provisions of the assured by the passengers was a physical necessity: the permission of such use by the master a high moral obligation, and so far from being liable to censure, he would have been deeply culpable had he acted otherwise than he did. So, upon similar grounds, he was entirely justified in selling a portion of the goods at Rio de Janeiro. The sale was made to enable him to pay for supplies and stores that were indispensable to the further prosecution of the voyage. He was without funds or credit, and a sale of a part of the cargo was his only resource. Under these circumstances, to make the sale was not only a right, but a duty.

If the losses, then, as they appear in the evidence, are reco-

verable at all, they can only be so under the general clause, which follows in the policy the enumeration of particular risks, and accordingly it was upon the construction that he urged us to give to the words of this clause that the learned counsel for the plaintiffs laid the stress of his argument. He insisted that they comprehend every loss, direct or consequential, that can possibly happen to the subject insured, no matter from what cause, or by whose act, in port as well as at sea, from the commencement until the termination of the voyage covered by the policy.

Nor can it be denied, that if the words of the clause are separately considered, such is their obvious and, indeed, necessary construction. It is a construction, however, so directly opposed to that which courts of justice have hitherto followed, that it is scarcely possible to imagine a more radical and extensive change in the law of marine insurance than its adoption would effect. It is so far from being true that the liability of the underwriters is subject to no limitation, that there are numerous classes of losses from which, according to all the decisions and the text writers, they are wholly exempt, although the words of the general clause, as construed by the counsel for the plaintiffs, certainly embrace them.

In determining the liability of the underwriters, no distinction is more fully established, or more frequently applied, than that between ordinary and extraordinary perils and losses. It is elementary. It is only for the latter description of losses that the insurer is liable. In the language of Mr. Justice Thompson in *Barnewell v. Church*, 1 Caines. 234, "he undertakes only to indemnify against the extraordinary and unforeseen perils to which every ship is exposed in the course of the voyage." Although to discriminate between ordinary and extraordinary losses is, in some cases, a matter of great nicety and difficulty, yet the cases are numerous in which the discrimination has been made, and has operated to defeat the claims of the assured.

Thus, if the masts and spars of the ship are damaged, or her sails torn or carried away, and even when in the course of the voyage she springs a leak, unless, in each case, the loss can be distinctly traced to the immediate and violent operation of a

peril of the sea, it is considered as resulting from the ordinary wear and tear of the voyage, and the expense of repairing it is never a charge upon the underwriter (1 Emerigon, 390; Pothier, n. 66; 3 Kent's Comm. 300; 1 Phillips, 625-6; 2 Arnould, 756-7; Benecke on Indemnity (Eng. ed.) 454-5-6).

There is another large class of losses, of very frequent occurrence, for which the law is settled, that the underwriter is not responsible. He is responsible only when the loss is occasioned by the operation of a cause, acting externally upon the subject insured; never when it arises solely from an internal and inherent principle of decay or corruption. Thus he is not responsible if fruit becomes rotten, or flour heated, or wine turns sour merely from internal decomposition, nor even when the property is destroyed by a spontaneous combustion arising from its own nature or accidental condition when laden (1 Phillips, 627-8; 2 Arnould, 756, § 282; 1 Emerigon, § 9: "*Du vice propre de la chose*," pp. 388-392; *Boyd v. Dubois*, 3 Camp. 133).

So when there is no insurance against barratry *eo nomine*, it appears to be clearly settled that the underwriter is not liable for losses occasioned by the barratrous acts of the master or crew, such as the wilful violation of a blockade, or an unlawful resistance to a search (*Harratt v. Wise*, 9 B. & C. 712; *Robinson v. Jones*, 8 Mass. 536; 9 Cranch, 63; 1 Emerigon, 484; 1 Phillips, 589, 592). It has never been supposed or intimated that such losses are covered by the general clause in the policy. And even when barratry is an enumerated risk, the underwriter is not liable for a loss directly attributable to the negligence of the master or crew. It may be admitted that, according to the modern decisions, when a peril insured against is the *proximate* cause of the loss, it is no defence to the underwriter that the peril was itself occasioned by the negligence of the master or crew (2 Arnould, 767-769, and cases there collected). But these decisions, difficult as it may be to reconcile them with former cases, have certainly not altered the law, when the negligence, and not an intervening peril, is the immediate cause of the loss (*Tanner v. Bennett*; *Ry. v. Mood*, 182; *Bradford v. Leoy*, 2 O. & P. 137; *Bradhurst v. Col. Ins. Co.* 9 John.

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17; *Potter v. Suffolk Ins. Co.* 2 Sumn. 197; 2 Arnould, 772; 1 Phillips, 589, 590).*

It is not necessary to pursue the discussion. It conclusively follows from the observations we have made that the underwriter, by the fixed legal interpretation of his contract, is not bound to make good to the assured all losses, without reference to their character or causes, that may happen to the property insured during the pendency of the risks, and, consequently, that the general words, which, in their literal extent, embrace all such losses, must be understood in a restricted sense. What is the nature of the limitation to which they are subject is the question next to be considered.

Nor, in our judgment, can this be treated by us as an open question. It is settled by many decisions and by the consent of all the text writers of authority. The words of the general clause, broad as they are, in this, as in many analogous cases, are limited in their application by the specification that immediately precedes them, and therefore have their due effect assigned to them by allowing them to comprehend and cover only such other cases of marine damage as are of the like kind (*ejusdem generis*) with those specially enumerated, and are occasioned by similar causes. It is true that Lord Ellenborough said in the case of *Cullen v. Butler* (5 M. & Sel. 461), that in the courts of law a judicial construction had not yet been given to the general clause in the policy; but whether that observation was strictly accurate or not, it is certain that, in this very case, the construction which we have given was adopted by the court, and equally so that it has since been uniformly followed (1 Phillips, 2d ed. pp. 688-9; 2 Arnould, pp. 842, 399, 314). They are the very words of Lord Ellenborough that we have used in stating the rule.

That the losses which are now sought to be recovered are of the "like nature, and were occasioned by similar causes" as

* That insurers are not liable for losses resulting immediately from the negligence of the master is now settled to be the law, by a recent decision of the Supreme Court of the United States—Vide *General Mutual Ins. Co. v. Sherwood*, 11 Leg. Observer, p. 129.

those specially enumerated in the policy, was very faintly asserted upon the argument, and we are clear in the opinion that this necessary analogy wholly fails. If it exist, we have been unable to discover it. The enumerated risks may be divided into two classes. They are either external causes acting with violence directly, or by a necessary consequence, upon the subject insured, or acts of illegality, malversation or fraud ; and it seems manifest that to neither class can the losses now claimed be justly, or even, speciously, referred.

But it is not upon this reasoning alone that we rest our decision. As we intimated upon the argument, the exact question has been determined in England, and determined in favor of the underwriter. In the case of *Powell v. Gudgeon* (5 Maule and Sel. 431), in which it appeared that the master, from his inability to procure funds, had sold a part of the cargo to defray the necessary expenses of repairing the ship, it was held by the Court of King's Bench that the underwriters were not responsible for the loss sustained by the shipper ; and in the case of *Sarquay v. Hobson* (4 Bing. 131 ; S. C. 1 B. & C. 7), this decision was approved and followed by the Court of Common Pleas. It is true that these cases apply in terms only to a part of the loss that is now demanded, but in principle they embrace the whole. Between a necessary sale by the master and a necessary consumption of the cargo by the passengers, we can make no distinction, nor was any attempted to be made by the ingenious counsel for the plaintiffs.

Nor is this all : the reason for exempting the underwriters from liability, in the present case, are in reality much stronger than in either of those to which we have referred. In each of those cases the sale of cargo was made in a port of distress, and for the purpose of meeting the expenses of repairs, which had been rendered necessary by a peril insured against, and hence it was very plausibly argued that the sale was a necessary consequence of the peril, and that the underwriters were therefore liable for the loss which it occasioned ; nor could any reply be made to this argument except that which was given by the court, namely : that the peril, although a remote, was not the proximate cause of the loss. In this case the sale was made—and the distinction is vital—not in a port of distress but of des-

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tion, nor can any peril covered by the policy be assigned as the cause, proximate or remote, of the necessity by which it was justified. The same remarks may be applied to the consumption of the provisions by the passengers. This consumption, not in itself a peril covered by the policy, was assuredly not the consequence of any other. In both cases the loss is attributable to the same causes—a gross neglect of duty on the part, not of the master, but of the owners of the ship.

It is said by Mr. Arnould, the author of a recent and very able treatise on marine insurance, that the underwriter is discharged from all liability “where the loss arises from causes which the owners or masters of a ship are bound by their duty as carriers to prevent, or which they might have prevented by a due exercise of reasonable and ordinary vigilance,” and the cases to which he refers fully sustain the doctrine and prove, that in such cases, the masters or ship owners are alone responsible for the loss sustained by a shipper (2 Arnould, 774–5).

We think it would be difficult to state or imagine a case to which this established and equitable doctrine is more strikingly applicable than to the present. It is doubtful, upon the evidence, whether any part of the loss was sustained before the ship arrived at Rio de Janeiro; if any, it was a small and not distinguishable portion. The entire loss as proved, arose from the sale made by the master at Rio, and from the consumption of the provisions belonging to the assured during the voyage from Rio to Valparaiso and thence to San Francisco. Both Rio and Valparaiso were ports of destination; ports to which the vessel was bound when she left Philadelphia. They are also well known ports of naval equipment and supply, where all the necessary means for the prosecution of the voyage, without resorting at all for any purpose to the goods of the shippers, might readily have been obtained had the master been provided by his owners with the requisite funds or credit. The result is, that it is to the neglect of the owners of the ship to furnish the master with the necessary funds or credit that the entire loss is directly and plainly imputable. This neglect, however, was a manifest breach of the duty of the owners as carriers—of their duty to passengers and shippers. They are just as certainly bound by their contract of transportation to put the ship, in all

respects, in a fit condition to prosecute the voyage at each intermediate port of destination as at the original port of departure. The decision of the Court of Errors in the *American Insurance Company v. Ogden* (20 Wendell, 287), appears to have settled the law in this state, that the ship owner is bound to furnish the master with funds or credit at a port of destination. If such is his duty in respect to the insurer, *a fortiori* is it in respect to shippers. The obligation of the owners in this case was exactly the same at Rio and at Valparaiso as at Philadelphia. For the loss, resulting from this violation of their duty as carriers, the owners, as in all analogous cases, are alone responsible, and it is against them, not the defendants, that the plaintiffs should have sought their remedy.

It remains to add a few words on the question of seaworthiness. The evidence, we think, was nearly conclusive that the ship was unseaworthy when she commenced her voyage. She had been at sea only nineteen or twenty days when she became short of water and the passengers and crew were put on allowance, and, as no supervening cause of the failure is shown, it is difficult to attribute it to any other than a deficiency in the original supply (*Fontaine v. Phoenix Insurance Company*, 10 John. 58). We were told indeed by the learned counsel for the plaintiffs, that the seaworthiness of the ship when the risks commence, is a presumption of law, which can only be repelled by positive evidence on the part of the underwriter. He must prove, even where it appears that the vessel became unseaworthy in the course of the voyage, that she was unseaworthy when it commenced; nor can it be said that this position is destitute of authority. It is in a measure sustained by the opinion of Mr. Phillips and by two or more decisions of the Supreme Court of Massachusetts (1 Phillips, 324; 2 do. 757; *Taylor v. Lowell*, 3 Mass. 341; *Paddock v. Franklin Insurance Company*, 11 Pick. 227).

In the case, however, of *Tidmarsh v. Washington Farmers' & Mechanics' Insurance Company*, 4 Mason, 446, it was decisively rejected by that consummate master of commercial law, Mr. Justice Story, and for reasons that appear to us not merely satisfactory, but conclusive. The seaworthiness of the vessel when the risks commence is a condition precedent to the

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attaching of the policy, and the fulfilment of this condition is the implied warranty of the assured. The general rule cannot be denied that the burden of proving the fulfilment of a condition precedent rests upon the party whose right to maintain his action or defence depends upon its performance, and no reason has been given why this rule is not just as applicable to the implied warranty of seaworthiness as to an express warranty of neutrality. The alleged exception would be purely anomalous.

The true rule deducible from a full comparison of the cases appears to be that which is stated by Mr. Arnould. The assured is bound to aver and prove that the ship was seaworthy when the risks commenced, but the proof to be given by him, in the first instance, need not be particular and full. Although slight and general, if not contradicted, it is deemed sufficient, and when given, it shifts the burden upon the underwriter (2 Arnould, § 447, p. 1345).

Applying this rule to the present case, it would probably not be difficult, upon this ground alone, to sustain the nonsuit, but as some evidence of seaworthiness was given, we will not say that the question might not with propriety have been submitted to the jury. We prefer to place our decision upon the ground that there was no evidence of any loss against which the defendants, by the just construction of the policy, undertook to indemnify the assured.

The motion for a new trial is therefore denied, and the judgment of nonsuit affirmed with costs.

**JULIANA BLYDENBURGH v. DAVID COTHEAL, impleaded with
ABNER JONES.**

A general covenant of warranty in a conveyance of lands is not a covenant of title merely, and therefore in effect a covenant of seisin.

In order to sustain an action for its breach an actual eviction or ouster must be averred and proved.

Construed as a covenant of title, it is not a covenant running with the land, and consequently no action for its breach could be maintained by an assignee.

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Thus construed, the covenant is broken as soon as it is made, and is converted by its breach into a *chose in action* which is not assignable.

An eviction means actual dispossession, and consequently an averment in the complaint, that the plaintiff by force of a paramount title, was evicted from her own right and title, as not averring or implying a change of possession, was held to be bad upon its face.

Judgment at special term affirmed with costs.

(Before DUEK, CAMPBELL, and BOSWORTH, J.J.)

Oct. 11, 12; 20, 1852.

APPEAL from a judgment at special term in favor of the defendant.

The action was brought to recover damages for an alleged breach of a covenant of warranty in a conveyance made by the defendant D. Cotheal and H. Cotheal, deceased, of lands in New Jersey. The plaintiff sought to recover as assignee of the covenant: the complaint upon the terms of which the decision partly turned is as follows:

The above named plaintiff in this action respectfully shows to this court, that under the date therein stated and for the consideration therein named, the defendant David Cotheal, together with Henry Cotheal, did execute and deliver to Jeremiah W. Blydenburgh a certain deed, in the words and figures following to wit:—

This Indenture, made the eighth day of November, in the year one thousand eight hundred and thirty-six, between Henry Cotheal and Phebe B. his wife, David Cotheal and Charlotte B. his wife, all of the city of New York, parties of the first part, and Jeremiah W. Blydenburgh, of the same place, gentleman, of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of twenty thousand dollars, lawful money of the United States of America, to them in hand paid, by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm unto the said party of the second part, and to his heirs and assigns for ever, all that certain tract or parcel of land, commonly known as the Lazarus Wilmurt tract, situate, lying and being in the township of South Amboy, county of

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Middlesex, state of New Jersey. Beginning at the edge of Amboy Bay where the line of General James Morgan, late of the township of South Amboy, county and state aforesaid, deceased, touches the same, thence along the aforesaid line, south sixty-three degrees and thirty minutes, west fifty chains and fifty links to a stake, thence north twenty-seven degrees and thirty minutes, west twenty-eight chains and forty links to a stake, thence north sixty-five degrees, east thirty-two chains and ninety-four links to the aforesaid bay shore, thence down the same the several courses thereof, to the place of beginning (saving and excepting out of the said tract above described, the small lot, piece, or parcel of ground said now or lately to belong to Peter Johnson, being about three acres more or less, and situated upon and near the north-westerly corner of the tract of land, above described), the said tract of land, hereby conveyed or intended so to be, after saving and reserving thereout, the small lot, aforesaid, containing one hundred and six acres be the same more or less, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof. And also, all the estate, right, title, interest, dower and right of dower, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, or to the above described premises, and every part and parcel thereof, with the appurtenances. To have and to hold, all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns for ever. And the said Henry Cotheal and David Cotheal for themselves, their heirs, executors, and administrators, do hereby covenant, promise, and agree to and with the said party of the second part, his heirs and assigns, that they have not done, committed, executed or suffered any act or acts, thing or things whatsoever, whereby or by means whereof the above mentioned and described premises or any part or parcel thereof, now are or at any time hereafter shall or may be impeached, charged, or encumbered in any manner or way whatsoever. And the said Henry Cotheal and David Cotheal and their heirs the above described

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and hereby granted and released premises, and every part and parcel thereof with the appurtenances unto the said party of the second part, his heirs and assigns, against the said parties of the first part and their heirs, and against all and every person and persons whatsoever, lawfully claiming or to claim the same, shall and will warrant and by these presents for ever defend to the amount, sum, and extent of ten thousand dollars; but not to any greater amount, sum, or extent.

In witness whereof the parties to these presents have hereto interchangeably set their hands and seals, the day and year first above written.

HENRY COTHEAL, [L. S.]

PHEBE B. COTHEAL, [L. S.]

DAVID COTHEAL, [L. S.]

CHARLOTTE B. COTHEAL, [L. S.]

Sealed and delivered in the presence of (the words "upon and" being interlined on the 31st line, first page, after the words "situate," and the words "Wilmurt," written on an erasure in the 14th line, first page, before execution)

CHARLES W. COTHEAL.

No. 1 New street, New York.

And afterwards on the first day of May, 1838, for the consideration or sum of four thousand five hundred dollars to him paid by the plaintiff, the said Jeremiah W. Blydenburgh, then in the actual possession of said land and premises; under his hand and seal did grant, bargain, sell, alien, remise, release, convey, and confirm unto the said plaintiff, her heirs and assigns, all the above described tract of land, by the same metes and bounds as in the above described conveyance to him by the said Cotheals; whereby the said plaintiff became and remains the lawful assignee of the said covenant of warranty, and to the damages arising from the breach of the same, to the amount or sum of four thousand five hundred dollars, and the lawful interest thereon.

And the said plaintiff further shows to this court, that the said defendant, David Cotheal, has not kept his said covenant, but has wholly failed to warrant and defend the plaintiff in the title to said land, and premises and hereditaments and appurtenances

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thereunto belonging, thus intended to be conveyed: but on the contrary thereof says, that the said premises were subject, and still remain subject, to injunction, restriction, and impeachment for all waste to the inheritance—in whomsoever else vested, either absolutely or contingently—committed or to be committed against them; and that the said Henry Cotheal and David Cotheal had cut and removed from the said premises large quantities of wood and clay before the date of their said conveyance; and that said plaintiff was lawfully evicted from the title and right to said premises, by a paramount and lawful title to the same, at the date of her said conveyance, and has ever since remained evicted, and hath thereby sustained damage to the amount of four thousand five hundred dollars, and the lawful interest thereon from the date of her conveyance.

And the plaintiff further shows to this court that Virginia W. Morehouse, Josephine B. Winchel, wife of Havila Winchel, and Elizabeth Morehouse, who are the lawful issue of Sarah Anne Morehouse, who is the daughter of Elizabeth Wilmurt, deceased, under whose will the defendant David Cotheal held possession, were at the date of the said covenants by the said David Cotheal, lawfully and solely seized, and still remain solely seized, in their own right, of the said lands and tenements invested, remainder in fee.

And the plaintiff further says, that the defendant Abner Jones claims or pretends to claim some lien or interest in the said covenants of the said David Cotheal, or suspension of the plaintiff's right of action for the damages arising from the breach thereof, or some part of the same.

Wherefore the said plaintiff demands judgment against the defendant David Cotheal for the sum of four thousand five hundred dollars, and the lawful interest thereon, from the first day of May, 1838; and that the defendant Abner Jones be barred from all claim to the said covenants, and the damages arising from the breach thereof.

The answer of the defendant Cotheal admits the execution and contents of the indenture set forth in the complaint, but denies that plaintiff was the lawful assignee of the covenant therein. It admits that Virginia W. Morehouse, Joseph B. Winchel, and Elizabeth Morehouse, are the lawful issue of

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Sarah Ann Morehouse, who was the daughter of Elizabeth Wilmurt, deceased, and that the defendant and H. Cotheal derived their title to the premises under the will of E. Wilmurt, as stated in the complaint, but denies that the children of Mr. Morehouse are seized of a vested remainder in fee. It also denies the commission of any waste creating a forfeiture, and sets up as a special defence in bar the foreclosure of a mortgage given for a part of the purchase-money by J. M. Blydenburgh, and subject to which the premises were conveyed to the plaintiff, but as no evidence was given in support of this defence, it is deemed unnecessary to state it with more particularity.

The cause was tried before Mr. Justice SANDFORD, in February, 1852, by the consent of the parties, without a jury.

Upon the trial, the counsel for the plaintiff read in evidence an admitted copy of the last will and testament of E. Wilmurt, containing a devise of all her real estate to her daughter Sarah Ann in fee simple, but with a limitation over to third persons "in case her said daughter Sarah Ann should depart this life without leaving lawful issue." He then proved that D. & H. Cotheal derived their title to the premises from and through Sarah Ann Morehouse and her husband, by producing and reading the conveyances, which it was admitted were their only source of title. The counsel also read in evidence the record of the proceedings with the *remittitur* attached, in a suit carried from the Supreme Court of N. Jersey into the Court of Errors or Appeals in that state, in which the present defendant, D. Cotheal, was plaintiff in error, and Virginia W. Morehouse, Josephine B. Morehouse (now Winchel), and Elizabeth Morehouse, by their guardian J. W. Blydenburgh and Havila Winchel, were defendants in error. The counsel then read as evidence of the law of New Jersey, two decisions in the above suit of the Supreme Court of that state, which are reported, 1 Zabriskie, 480, and 2 Zabriskie, 434. The suit in N. Jersey, it appeared from the record, was an action of waste brought by the defendants in error, the children of Mrs. Morehouse, to recover the lands that had been conveyed to the Cotheals. The declaration stated in substance that E. Wilmurt died seized of the premises, and by her last will devised the same to her daughter Sarah Ann, in the manner above stated. It then set

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forth an act of the state of New Jersey, passed the 18th of June, 1820, which enacted among other things, that "from and after the passing of that act, when any conveyance shall be made whereby the grantee or devisee shall become seized in law or equity of such estate in any lands or tenements, as under the statute of the thirteenth of Edward the First, called the statute of entails, would have been held an estate in fee tail, every such conveyance or devise shall vest an estate for life only in such grantee or devisee, who shall possess and have the same power and right in such premises, and no other, as a tenant for life thereof would have by law, and upon the death of such grantee or devisee the said lands and tenements shall go to and be vested in the children of such grantee or devisee, equally to be divided between them as tenants in common in fee; but if there be only one child, then to that only in fee; and if any child be dead, the part which would have come to him or her shall go to his or her issue in like manner. Provided, the widow of any such grantee or devisee shall have her dower in the premises in like manner as if the said grantee or devisee had died seized thereof in fee simple. And provided, when any person shall marry a woman being a grantee or devisee and seized of such estate, the said husband, after the death of his said wife, shall have his curtesy in the said lands and tenements, if there be issue of the marriage, in like manner as if the said wife had died seized of an estate of inheritance in fee tail of the premises."

The declaration then averred, that by virtue of the devise, and of the statute aforesaid, Sarah Ann Wilmurt entered into and became seized of the tenements in her own demesne as of freehold for the term of her own life, and that being so seized she intermarried in the month of October, 1828, with Andrew H. Morehouse, who therefore in right of his wife became jointly seized of the tenements with the appurtenances for the term of his life, if issue he should have by such marriage. It then set forth the birth of Virginia and the two other children of Mr. Morehouse, the appointment of J. W. Blydenburgh as their guardian, the title and entry of D. and H. Cotheal, and various acts of waste which it charged to have been committed by them, -to the prejudice of the children as entitled to the reversion in

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fee, and concluded with an allegation of damages to the extent of three thousand dollars.

To this declaration the defendants D. and H. Cotheal pleaded the general issue, denying waste, and also the following special plea—

“The said Henry and David Cotheal say, that the said plaintiffs ought not to have or maintain their said action against them, because they say that the said last will and testament in the plaintiff’s said declaration mentioned was and is a certain last will and testament of the said Elizabeth Wilmurt, made and published by the said Elizabeth Wilmurt, and duly executed and attested to pass real estate, on the 7th day of March, A.D. 1835—to wit, at the township of South Amboy in the county of Middlesex aforesaid; in and by which said last will the said Elizabeth Wilmurt, after directing her debts and funeral expenses to be in the first place paid out of her personal estate by her executors, and after giving and bequeathing to her son Thomas Wilmurt the sum of one hundred dollars, to be raised out of her personal estate, after her debts and funeral expenses should be paid, if there should so much thereof be left for that purpose, to be paid by her executors within one year after her decease, did devise as follows, to wit: ‘I give, devise and bequeath unto my daughter Sarah Ann Wilmurt, and her heirs for ever, all the rest and residue of my estate, both real and personal, whatsoever and wheresoever. But if it should so happen that my said daughter Sarah Ann should depart this life without leaving lawful issue, then and in that case I give, devise, and bequeath unto Ann Rose, daughter of William Rose, late of South Amboy, deceased, and to Elizabeth Wilmurt Hyer, daughter of William Hyer of the city of Trenton, in the county of Hunterdon and state of New Jersey, and to their and each of their heirs for ever, all my real and personal estate whatsoever and wheresoever that I now possess, or may hereafter possess, to be held by the said Ann Rose and Elizabeth Wilmurt Hyer as tenants in common, and not as joint tenants. And my will further is, that if my said daughter Sarah Ann should not marry, and should depart this life before my decease, then I will that all my personal estate, after the payment of my debts and funeral expenses, and the legacy of

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one hundred dollars bequeathed to my son Thomas Wilmurt, be equally divided between the said Ann Rose and Elizabeth Wilmurt Hyer, share and share alike, in addition to the above devise of my real estate to them and to their heirs in the event of my daughter Sarah Ann dying without lawful issue.' As by, &c. &c., will fully appear. And the said Henry and David Cotheal further say, that after the decease of the said Elizabeth Wilmurt as mentioned in the plaintiff's said declaration, the said Sarah Ann thereupon, under and by virtue of the said will, became and was seized of the said premises, with the appurtenances, according to the said will; and afterwards, to wit, at the time and place in the said declaration mentioned, intermarried with the said Andrew K. Morehouse. Whereupon, and by virtue of the said will of the said Elizabeth Wilmurt, the said Andrew K. Morehouse, and the said Sarah Ann his wife, in right of the said Sarah Ann became and were seized of the same tenements, with the appurtenances in their demesne as of fee, to wit, to them and to the heirs of the said Sarah Ann, of an estate therein, defeasible only upon the event of the said Sarah Ann's dying and leaving no issue surviving her at the time of her death; with this, that the said Henry and David Cotheal aver that the said Sarah Ann is yet surviving and alive, to wit, at the county of Hamilton in the state of New York aforesaid. And the said Henry and David further say, that afterwards, to wit, on the 18th of July, 1830, at South Amboy, &c., the said Andrew K. Morehouse and Sarah Ann his wife, being so seized as aforesaid, by a certain indenture of bargain and sale then and there made between the said Andrew K. Morehouse and Sarah Ann his wife of the one part, and the said Henry and David Cotheal of the other part, and duly acknowledged by the said Sarah Ann so as to pass her estate and interest (one part of which said indenture, sealed with the seals of the said Andrew and Sarah Ann his wife, the said Henry and David now bring here into court, the date whereof is the day and year last aforesaid), for the consideration therein mentioned, the said Andrew K. and Sarah Ann his wife bargained and sold and conveyed the equal undivided moiety of the said premises, with the appurtenances, to the said Henry and David in fee simple, as by the said indenture more fully

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appears. Whereupon the said defendants then and there became and were seized thereof in their demesne as of fee, to wit, of an estate therein in fee simple, defeasible only upon the event of the said Sarah Ann's dying and leaving no issue her surviving at the time of her death; and afterwards, to wit, on the 19th day of October, 1831, at South Amboy, aforesaid, &c. Andrew Snowhill then being sheriff of the county of Middlesex, state of New Jersey, by his certain deed of conveyance then and there duly made and delivered under and by virtue of the special authority to him for that purpose given, duly and particularly recited in the said deed, which said deed of conveyance, sealed with the seal of the said Andrew Snowhill, then being sheriff as aforesaid, the said defendants, Henry and David, now bring here into court, the date whereof is the day and year last aforesaid, did bargain and sell and convey unto the said defendants, Henry and David, the other moiety of the said premises, with the appurtenances in fee simple, and all the estate, right, title, and interest of the said Andrew K. Morehouse and Sarah Ann his wife in and to the same, as by the said deed of conveyance more fully appears. Whereupon the said defendants, Henry and David, then and there became and were seized thereof in their demesne as of fee, to wit, of an estate therein in fee simple, defeasible only upon the event of the said Sarah Ann's dying and leaving no issue her surviving at the time of her death—without this, that upon the death of the said Elizabeth Wilmurt the said Sarah Ann, under and by virtue of the said will, into the said tenements with the appurtenances entered and was thereof seized in her own demesne as of freehold for the term of her life, and the said Virginia W., Josephine B., and Elizabeth, also by virtue of the said will and of the statute in the said declaration mentioned and recited, then and there became and remain as yet solely seized of the same lands and tenements with the appurtenances, in vested remainder in fee and of right, in manner and form as the said plaintiffs have above alleged; and this the said Henry and David are ready to verify. Wherefore, they pray judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against them, &c.

To this second plea the plaintiffs demurred, as follows:

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And the said plaintiffs as to the plea of the said defendants secondly above pleaded, say, that the same and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude them the said plaintiffs from having or maintaining their aforesaid action thereof against them the said defendants, and that they the said plaintiffs are not bound by law to answer the same, and this they the said plaintiffs are ready to verify. Wherefore the said plaintiffs pray judgment whether they ought to be barred or precluded from having or maintaining their aforesaid action against the said defendants by reason of anything contained in said plea.

And the said plaintiffs according to the form of the statute in such case made and provided, state and show to the court here the following causes of demurrer to the said second plea, that is to say—

First. For that the said plea hath not confessed, avoided, traversed, or denied the causes of action alleged in the said declaration, nor hath the said plea recited or stated anything from the last will and testament of Elizabeth Wilmurt, inconsistent with the title alleged in said declaration, or as creating any such estate in the said defendants or their grantors, as is alleged and supposed by said plea.

Second. For that the said plea doth not pretend to recite the whole will of Elizabeth Wilmurt, or in any manner deny but that the said will contains the very devise mentioned in said declaration, both in form and effect, as therein stated and set forth.

Third. The said plea is inartificially pleaded, and in other respects uncertain.

The demurrer was sustained by the judgment of the Supreme Court, and the plea overruled in the term of April, A. D. 1850. The cause then proceeded to trial upon the general issue, and was tried at the Middlesex June Circuit ensuing, and upon such trial the jury rendered a verdict for the plaintiffs as stated in the postea, as follows, to wit: "That the said defendant, David Cotheal (the said Henry Cotheal having before that time died), did make waste, sale, and destruction in woods and lands; that is to say, in taking twenty cords of wood from Spring Hollow,

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and five cords of wood from Sugar-loaf Hill ; and oaks, chestnuts, pines and other trees from the premises adjoining Spring Hollow, and dispersely standing among the clay pits upon said premises, in quantity equal to fourteen and a half cords of wood in manner and form as the said plaintiffs have by their declaration supposed—and they together assess the damages of the said plaintiffs by reason thereof at the sum of \$89. And as to the other waste charged in said declaration, the jurors aforesaid upon their oaths say the said defendant, David Cotheal, made no waste, sale and destruction, as the said plaintiffs in the said pleading have alleged.

And thereupon judgment was afterwards, to wit, on the 19th day of July, A. D. 1850, rendered as follows, to wit—Therefore it is considered that the said plaintiffs Virginia W. Morehouse, Josephine B. Winchel, Elizabeth Morehouse, and Havilla Winchel, in right of his wife the aforesaid Josephine, recover their seizin of the said defendant, David Cotheal, of the places wasted by the view of the jurors aforesaid ; and also recover their damages assessed by the jury, \$89, trebled in pursuance of the statute, amounting to the sum of \$267. And also for their costs and charges by them about their suit in this behalf expended the sum of \$82 90, by the court now here adjudged to them and with their assent, and that said defendant be in mercy, &c.

And the said plaintiffs pray a writ of the state of New Jersey, to the sheriff of the county of Middlesex, commanding him to cause them to have their full seizin of the places wasted, by the view of the jurors aforesaid, is granted to them returnable, &c. ; and also pray a writ of *fieri facias* to the same sheriff, commanding him to make of the goods and chattels, lands, and tenements, &c., of the defendant, David Cotheal, their treble damages with their costs and charges so recovered as aforesaid, it is also granted to them returnable, &c.

With the plea of the general issue there was a notice of this import, that, on the trial it would be shown that the wood cut was used for repairs to the fences and premises, and the clay dug from open and accustomed mines, &c.

To review these judgments, a writ of error in the ordinary form was issued, and the assignment of errors is as follows, viz. :

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Afterwards, to wit, of the same term of October, eighteen hundred and fifty, before the said Court of Errors and Appeals of the State of New Jersey, at the State House in the city of Trenton, comes the said David Cotheal, by William H. Leupp, his attorney, and saith—That in the record and proceedings aforesaid, and also in the giving as well the judgment heretofore given, to wit: in the term of April, A. D. 1850, by which judgment the plea of the said Henry Cotheal and David Cotheal, by them secondly above pleaded, was by said Supreme Court overruled, as also in the final judgment by said court rendered and given in said suit, there is manifest error in this. That by the terms of the will of Elizabeth Wilmurt, in said second plea recited and set forth, it was the manifest design of the said Elizabeth Wilmurt to give and devise, and the said testatrix did give and devise, to her daughter, Sarah Ann, in said will named, an estate in fee simple in the lands and real state the subject matter of said bequest, determinable and defeasible only by the death of said Sarah Ann without issue left by her at the time of her death, whereas by the aforesaid judgment it was adjudged and determined that by said devise the said Sarah Ann Wilmurt took and was entitled to an estate tail in said lands and real estate.

2. And in the giving of the final judgment aforesaid, there is manifest error in this. That whereas by the record it appears the judgment final was given in said suit, for the said plaintiffs against the said defendant being here the plaintiff in error, whereas by the law of the land the said judgment ought to have been given for said plaintiff in error the defendant as aforesaid in said suit.

3. And there is further manifest error in this, that said judgment is variant from the verdict rendered by the jury empanelled and sworn to try said cause.

4. And there is also error in this, that as by the record aforesaid manifestly appears, the verdict rendered by said jury is insufficient, and void in not ascertaining the specific value and kind of trees and wood alleged to have been wasted, and in that the assessment of damage thereby is joint and general, and in that the quantity of land alleged to have been wasted is neither ascertained nor defined.

5. And said final judgment is also erroneous in not acquitting and discharging said defendant from the waste charged in the declaration in said suit affiled, and as to which waste the defendant was acquitted by the verdict aforesaid as rendered.

6. And further, said judgment and proceedings are in divers other respects erroneous, informal and insufficient, and especially in that the judge, before whom said cause was tried, on exception thereto made by the plaintiffs, refused to admit evidence of the repairs made to buildings and fences on said premises and other similar improvements thereon, by the said defendant. And the said plaintiff in error prays that the judgments aforesaid for the errors aforesaid and other errors in the record and proceedings may be reversed, annulled, and for nothing held, and that the plaintiff in error may be restored to all things which he hath lost by occasion of said judgments.

It further appeared from the record, that in April Term, 1851, the Court of Errors and Appeals reversed the judgment of the Supreme Court for the errors assigned, and ordered that the defendant D. Cotheal should be "restored to all things which he had lost by reason of such judgment, and that the record and proceedings be remitted to the said Supreme Court." They were remitted accordingly, the remittitur filed, and the proper order entered thereon.

It does not appear from the record what were the exact grounds of reversal of the judgment, nor is there any report of the case in the Court of Errors.

No other evidence than that which has been stated was given by counsel on the part of the plaintiff before Judge Sandford, nor was any evidence given on the part of the defendant. The learned judge directed judgment to be entered for the defendant, and stated, in writing, the following as the grounds of his decision :—

1. If there was an eviction by means of defendants' commission of waste as claimed, it took place at the date of their deed to plaintiff's grantor, their covenant of warranty was then broken, and the damage did not pass to the plaintiff.

2. There has been no eviction as matter of fact, the plaintiff was never molested or disturbed in the possession of the premises, in consequence of the waste or by the alleged hostile title.

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3. The evidence does not show that the title set up in the Morehouses is valid, nor that the defendants had not the whole title in fee. As the law is in this state, Mrs. Morehouse took a conditional fee, with an executory devise over, and her children took no estate by the will.

The counsel for the plaintiff excepted to the decision, and the case was now heard upon the pleadings and bill of exceptions.

J. W. Blydenburgh for the plaintiff, argued as follows—

I. The will of E. W. was made and proved before the year 1839, and the devise over to R. & H. being on an indefinite failure of issue, was by the law of this state a fee tail in the first taker. (See *Patterson v. Ellis*, 11 Wend. 259, 261; *Lott v. Wyckoff*, 2 Com. 355, 442; *Baker v. Lorillard*, 4 Com. 261.) It was, by the law of New Jersey, the same (1 Zabriskie, 480, and cases there cited; 2d of do. 434), and this court had no right to presume the law of New Jersey otherwise, without authority of any kind, and against the Supreme Court of New Jersey.

The construction of the will, by the Supreme Court of New Jersey, is conclusive evidence of the law of that state, in this case, until the contrary be shown.

The Court of Errors in New Jersey merely reversed the judgment to recover treble damages for the waste charged, and the remittitur proves no point decided. There was no bill of exceptions, and they could not award a *venire de novo*. (3 Denio, 97, and authorities there cited.)

They could not give a new judgment, or restore the cause to the court below. (3 Denio, 97.) The question of title was not before the Court of Errors on that writ of error, by the rule or principle of the common law: the law of error in that state, which will be presumed to be the common law, until the contrary appear. The title was before the court below on the trial of the cause, under the general issue. If exception to the title was there waived, it could not be taken in the Court of Errors, but as error in the interlocutory judgment. If taken and overruled, it was not carried to the Court of Errors by bill of exceptions, which could alone authorize that court to restore it to the court below, as an open question.

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The errors assigned were numerous, and the Court of Errors decided and settled no principle whatever. (Opinion of Bosworth J. in *Oakley v. Aspinwall*.) It is not deference to the Court of Errors to refuse judgment in other actions, because that court settled nothing in that particular case. (See opinion of Sandford J. in *Oakley v. Aspinwall*.)

The remaindermen have still a statutory right of entry for the waste. There is nothing that shows no waste was committed, or bars a right of entry upon the land therefor. Plaintiff in error did not ask for a new trial, or claim a verdict in his favor. If he took the chance of a verdict without complaint, he cannot object above or assign it as error. If he had evidence of title, it was properly left to the jury. If there was none, and that was the error assigned, it was the duty of the Court of Errors to reverse or affirm the judgment, and either decided the title. Either this fact was well submitted, or the defendant had the unfair benefit of a chance in error, which, however, did not avail him; either way, he has no right to question the title in remainder now.

The reversal of a judgment for waste does not take away the previously existing right of entry for the waste. (*Badger v. Flويد*, 12 Mod. 398, and *Withers v. Harris*, 2 L. Raymond, 808.) Neither the judgment for waste, nor the reversal of it, can leave the party worse than he was without the judgment. It merely throws him back upon the statutory right of entry.

A naked reversal restores him to his right of action. (*Stewart v. Close*, 1 Wend. 441, and concurred in by the Court of Errors, 4 Wend. 95.)

The positive fact that the Court of Errors, by its solemn judgment, restored the plaintiffs below to their original right of action, precludes their doubt of a title, which alone could sustain it.

Mr. Cotheal asked to be eased of a judgment of forfeiture, and treble damages for waste. He obtained no judgment in his favor, and took no steps by which he could obtain one, much less an implied transfer of another's title to himself, as a reward for wasting that inheritance.

The title in remainder was indeed necessary to support the judgment for waste, but a transfer of that title was not neces-

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sary to reverse the judgment ; nor is there a particle of evidence that that title was doubted for the purpose of reversal. If at all considered, it was in no wise impeached, nor is there an opinion or intimation against it by the Court of Errors. We are bound by the record. The opinion of the Supreme Court still stands as the construction of the will and the law of the title. Mr. Cotheal asked for a reversal of the judgment of the Supreme Court upon the title, but obtained no opinion of the Court of Errors to that effect. If they could not give such a judgment, they might have given an opinion to that effect, if they so intended ; but their refusal is conclusive that they did not intend to prejudice a new action for the waste, or throw a cloud upon the title in remainder. Neither the statute nor the forfeiture was reversed or disturbed. Silence was not evidence, where there was no authority to decide, or intention to embarrass.

THE EVICTION.

There can be no stronger proof of actual eviction from title, than the fact that a vested remainder exists outstanding.

But, cutting wood and trees, and vending clay, is admitted by the pleadings. This was waste, which gave the remaindermen an actual right of entry, without process of any court. (Elmer's L. of N. J., 82.)

“ When the right exists, it is absurd to hold that its exercise was no eviction, merely because the holder of the estate in remainder had not first invoked the aid of a court to do that which the statute declared should have all the force and effect of a writ of possession.”

The right of entry being in infants, no statute of limitations run against it, nor were they capable of waiving the right by election. It was a continuing right, and the question of fact is, did they exercise it ?

A stranger may enter to the use of an infant without other authority, and the entry will be good, if openly avowed, and not a mere trespass. (*Fritchett v. Adams*, 2 Strang. 1128.)

The covenantee was in actual possession of the places alleged to be wasted at the date of plaintiff's deed, 1838. A continuous fact is supposed to continue, until the contrary appear ; and

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it is nowhere alleged that plaintiff ever made an actual entry upon the places wasted, but, on the contrary, she alleges eviction at that time, and ever since, and the defendant's answer does not deny her eviction, but, that it was by paramount and lawful title.

The answer states, that ejectment was commenced by Cotheal against plaintiff, and the defendant then in possession of the premises, in April, 1847, and judgment rendered against them in 1848, which was enforced March 1st, 1849.

That defendant, from 1847 to 1849, was then in actual possession of the premises, and, by the title of the action for waste, 1848 (1 Zab. 481, 335), was the guardian of the remaindermen, claiming the premises by statutory right of entry, and prosecuting the action at that time. The record then proves a claim, by the remaindermen, for the premises as forfeited in 1847, and a right, by statute, to enter thereupon, and the party in actual possession admitting the claim by prosecuting the action in 1848, before their removal by Cotheal, March 1st, 1849. This is a complete eviction from possession as could possibly take place or be imagined. (*Stewart v. Drake*, 4 Halstead, 139.)

The right of entry by statute, and entry without judicial process, was and remains equivalent to the execution of a writ of possession; a legal eviction from possession by process of law, although not judicial process. (See *Smith v. Sheppard*, 15 Pick. 147; *Gove v. Brazier*, 3 Mass. 540; *Rickert v. Snyder*, 9 Wend. 422.)

The entry for forfeiture vested the estate in actual possession of the remaindermen, which could not be divested by the reversal on the ejectment suit.

If the plaintiff can sustain the title to which she voluntarily yielded as valid and paramount, it is an eviction. (*Hamilton v. Cutts*, 4 Mass. 350; *Stone v. Hooker*, 9 Cowen, 157; *Green-vault v. Davis*, 4 Hill, 643; *Smith v. Shepherd*, 15 Pick. 147.)

[See Ruffin at length in *Grist v. Hodges*, 3 Devereaux, 200.]

See *Clark, Lessee, v. Courtney*, 5 Peters, 354, and Smith's Leading Cases, 469, Am. ed.

The possession of a termor or tenant under penalty of forfeiture and treble damages, is not the possession warranted by the covenant, or that of an absolute owner, but of a quality entirely

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different. Any abridgment or qualification of the right to a full possession, is a breach of the covenant of warranty.

II. The covenant of warranty was broken as soon as made, by the mere existence of an outstanding vested remainder, the possession of which never passed to the covenantee.

The right of action for this breach remained with the covenantee, until the alienation, when the covenantee received \$4500 of his alienee, who by possession of the term became vested with the right of action for that amount against the covenantor, and the right of action in the covenantee thereby suspended until restored by payment of that sum to the alienee. This rule holds even where the deed contains several covenants, followed by that of warranty, because on all the covenants there are but the same damages, to which and for which the alienee has priority of action, if possession of any part or quality pass to him, and the breach continues. Hence the covenantee can never sue even on a covenant of seizin, until the alienee is satisfied his damages under the covenant of warranty. (*Suydam v. Jones*, 10 Wend. 180 ; 5 Cow. 143.)

H. Thompson, for the defendant Cotheal, presented and argued the following points —

I. There is no proof of any title in the Morehouse children, because: 1st. To establish such title, it must be held that Sarah Ann, their mother, took a fee tail, and that Cotheal had only the conveyance of a fee tail, and was liable for waste, and forfeited the land by the commission of waste, before November 8th, 1836. 2d. The decision of the Court of Errors and Appeals of New Jersey establishes that Mrs. Morehouse took a fee, determinable and defeasible only by her death, without issue left at her death. 3d. Without proof of the law of New Jersey, the devise would be decided according to our law. Mrs. Morehouse, by our law, took a fee, with an executory devise over, and her children took no estate by the will of Elizabeth Wilmurt. (1 Cowen, 103 ; 2 Hill, 201 and 2, 319 and 322 ; 3 Paige, 281 ; 8 Paige, 483.)

II. There was no eviction in fact. The plaintiff was never disturbed in possession of the premises in consequence of any

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waste committed, or by the existence of the Morehouse title. (11 N. Hampshire Rep. 74.)

III. To maintain an action on a covenant of warranty and quiet enjoyment, there must be an actual eviction, or a surrender of the possession to the lawful owner, by paramount title. (6 Barbour, 165; 4 Hill, 643; 21 Wendell, 120.) Here there has been neither; and the covenant of warranty is not broken till eviction. (4 Kent's Com. 471, 2d ed.; 3 Barbour Chan. Rep. 528.)

IV. The foreclosure barred this plaintiff from all right and claim, and cut off the covenant of warranty, if the same could run with the land.

V. If there be an eviction in this case, such as would authorize an action on account of waste committed, then such covenant was broken before conveyance to her, and the covenant did not run to the plaintiff. (2 Barbour, 300; 1 Comstock, 564.)

By THE COURT. DUER, J.—It is difficult to understand from reading this complaint exactly upon what ground the plaintiff claims to recover; whether upon the ground that the defendant and his brother had only a life estate when they conveyed, and that the remainder in fee was then vested in third persons, or that by the commission of waste their title and right to the possession were wholly divested. It is quite unnecessary, however, to determine this question, since there is no hypothesis, consistent with the facts in evidence, upon which the defendants can be rendered liable in the present action.

X The covenant of warranty upon the breach of which alone this action is founded, is not a covenant, that the party covenanting is then seized and will continue to be seized of an absolute indefeasible estate in the premises conveyed, and, consequently, it is not violated merely by the existence of an outstanding paramount title. Its true meaning and legal interpretation is that the grantee, his heirs and assigns, shall not be deprived of the possession by force of a paramount title. X It is true, that there are cases in the English reports from which it may be inferred that a general covenant of warranty is there construed as a covenant of seizin, but in this state, and in other states of the Union, the law is settled by numerous deci-

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sions that in order to maintain an action for a breach of the covenant, an actual eviction or ouster, from the possession of the whole or of a part of the premises conveyed, by force of a paramount title, is necessary to be proved. It may not be necessary to prove an eviction by process of law, for the possession may be changed by its surrender to the rightful owner, but, in all cases to show a breach of the covenant, evidence of an actual and lawful dispossession must be given. (*Vanderham v. Vanderham*, 11 John. 122; *Montresor v. Rice*, 3 Wend. 180; *Webb v. Alexander*, 7 Wend. 281; *Beddoes, Executor, v. Wadsworth*, 21 Wend. 120; *Greenwault v. Davis*, 4 Hill, 643; *Mitchell v. Warner*, 5 Connec. 521; *Loomis v. Bedell*, 11 N. Hamp. 521; *Emerson v. Proprietors, &c.*, 1 Mass. 464; *Hamilton v. Cutts*, 4 Mass. 349.)

In the present case, there is no evidence to show an actual eviction of the plaintiff from the possession of the whole or of any part of the premises, either by the children of Mrs. Morehouse, in whom the remainder in fee is alleged to be vested, or by any other person having a title paramount to that which the defendant conveyed; nor, in truth, is any such eviction averred in the complaint. The complaint, indeed, avers that the plaintiff has been evicted by a paramount title from the title and right conveyed to her, but an eviction merely from a right and title is language unknown to the law, and is either wholly unmeaning, or means only that a title was vested in third persons preferable to that of the plaintiff. Construing the covenant of the defendant as a covenant of seizin, the complaint avers a breach, and not otherwise. It is, therefore, bad upon its face, and no evidence was given upon the trial that could justify its amendment.

Of an actual entry by the children of Mrs. Morehouse, or their guardian, at all affecting the possession of the plaintiff, there is no evidence whatever, and the supposition that the existence of a statutory right of entry was in judgment of law equivalent to a positive eviction, we do not hesitate to reject as unsound and extravagant. If a subsisting right of entry in the persons entitled in remainder placed them in judgment of law in the actual possession, it follows that, as this right, if it ever existed,

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accrued before the conveyance to the plaintiff, she has never been in possession at all, and consequently has never been evicted.

Even could we be justified in saying that a covenant of warranty, like that of seizin, is merely a covenant of title, we should still be constrained to hold that the plaintiff, as an assignee, is not entitled to maintain this action. Thus construed, the covenant, if broken at all, was broken as soon as the deed containing it was delivered, and J. W. Blydenburgh, the grantor of the plaintiff, could have maintained an action for its breach. The law, however, is established and undoubted, that a broken covenant does not run with the land, since it is converted by the breach into a mere *chose in action*, which the law forbids to be assigned. (9 Coke, 60. Cro. James. 369. *Greenly v. Wilcox*, 2 John. R. 1. *Ker v. Shaw*, 13 id. 236. *Witty v. Mumford*, 5 Cow. 137. *Mitchell v. Warner*, 5 Conn. 497. *Bartholomew v. Canche*, 4 Pick. 167. *Clark v. Swift*, 3 Metcalf, 390. 4 Kent's Com. 5 ed. p. 491, note (a) and cases there cited. Vide also, 4 Sand. S. C. Rep. p. 821.)

In the observations that have now been made, we have assumed, that the devise to Sarah Ann Morehouse, in the will of Elizabeth Wilmurt, created an estate tail, which by force of the New Jersey statute was converted into an estate for life in the mother, with the remainder in fee to her children. The Supreme Court of New Jersey, in the cases that were referred to on the argument, gave this construction to the devise, and we certainly incline to think that the construction is justified by the decisions in England, and the strict rules of the common law. The judgment, however, of the Supreme Court of New Jersey was reversed by the Court of Appeals, and upon examining the record, we are of opinion that the reversal could only have proceeded upon the ground that the plea of the defendants, which had been overruled, ought to have been sustained as a valid and full defence. We believe, therefore, that the Court of Appeals meant to decide that the construction which the court below had given to the will of E. Wilmurt was erroneous, and that by force of the devise, Mrs. Morehouse took not an estate tail, but a fee, determinable only by her death without issue then living. We do not deem it necessary, however, to place

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our own decision upon this ground, since even upon the supposition that the remainder in fee is vested in the children of Mrs. Morehouse, the present action, for the reasons that have been given, is certainly not maintainable.

There is another objection to the plaintiff's recovery which we deem it proper to state, although it was neither raised on the argument before us, nor seems to have been taken in the court below.

It is quite certain that an action for waste can only be maintained by those in whom the next immediate estate of inheritance, in remainder or reversion, is vested. It will not lie on behalf of the remainderman or reversioner in fee, where there is an intervening estate for life; in other words, where there are two or more successive estates for life, and the persons so entitled are still living. (Co. Litt. 536-54, and 4 Kent Com. 78.) It is true that in this state the Revised Statutes have given the remedy of an action of waste or trespass to the remainderman or reversioner, notwithstanding there is an intervening estate for life or years (2 R. S. p. 750, § 8); but as there is no evidence of a similar statute in New Jersey, we are bound to presume that, in that state, the common law doctrine still prevails. Adopting then the plaintiff's construction of the devise to Mrs. Morehouse, the necessary effect of the New Jersey statute upon the devise, as the facts existed when the Cotheals acquired their title, was to create two successive estates for life—an estate in Mrs. Morehouse in her own right, and in her husband as tenant by the courtesy. Until her marriage, Mrs. Morehouse was the sole tenant for life, but after her marriage and the birth of a child, the husband became seized of the freehold for his own life,—and the life estate of the wife, as an estate in possession, was displaced and converted into a remainder. The children, therefore, are not entitled to the next immediate estate of inheritance to take effect in possession upon the death of their father, since there is an intervening estate for life in the mother, which, so long as both parents are living, is a bar to any common law or statutory remedy for waste to which they might otherwise be entitled. There is no evidence that either of the parents has died, and we are therefore bound to assume that both were living not only when the alleged waste was

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committed, but when the action founded upon it was commenced. The allegation, therefore, that the children have had or now have a right of entry, as resulting from the waste, would seem to be groundless.

We do not at present see that any satisfactory answer can be given to the objection that has now been stated, but as it is our invariable rule never to decide a cause upon a point not argued by the counsel, we do not make it a ground of our decision. We affirm the judgment at special term with costs, upon the ground that there is no proof of an actual eviction—therefore, no proof that the covenant of warranty has been broken.

WM. J. BROWN and GEO. W. CANNING v. GEORGE BRADSHAW.

In an action against A to recover for goods furnished to and on the application of B, a verdict in favor of the plaintiff will be set aside as against evidence, where the evidence is uncontradicted that the plaintiff charged the goods to B, and has received payments from A, on the account, as made on the debt of B, and there is no evidence inconsistent with the truth of the case being as evidenced by such facts.

Where any credit is given to the party applying for and obtaining property, the promise of a third person to see the debt thus contracted paid, is void by the statute of frauds, unless in writing and expressing the consideration.

Where a verdict is set aside solely on the ground that it is against evidence, it will only be done upon payment of costs.

(Before DUER, CAMPBELL, and BOSWORTH, J. J.)

October 12; October 30.

THIS cause was tried before Justice Sandford and a jury. A verdict was rendered in favor of the plaintiffs for the amount claimed. The defendant moves for a new trial on the ground that the verdict is clearly against evidence. The facts sufficiently appear in the opinion of the court.

James T. Brady, for defendant.

—— *Parsons*, for the plaintiff.

BY THE COURT. BOSWORTH, J.—The complaint states a cause of action for goods sold and delivered by the plaintiffs to the

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defendant between the 1st of November, 1850, and the 1st of February, 1851. The goods were in fact furnished on the application of one Richard McNulty. The judge before whom the cause was tried instructed the jury that the question to be determined was, to whom was this lumber sold and delivered? If the lumber was sold to McNulty, and on his credit, the defendant is not liable; if it was sold to the defendant, and on his credit, and at his request, then he is liable. If it appears that the lumber was sold to McNulty on his credit and upon the promise of the defendant to see the plaintiffs paid, the defendant is not liable. The jury found a verdict in favor of the plaintiffs for \$204, the amount claimed by the plaintiffs.

Assuming the jury to have acted in obedience to the charge of the court, they must have found that the lumber was not sold to McNulty, wholly or in part on his credit, but was sold to the defendant on his credit and at his request. The defendant moves for a new trial on the ground that the verdict is against law and evidence.

The testimony shows that McNulty, on the 1st of November, 1850, agreed to purchase of the defendant five lots at a specific price, and to erect on them five dwelling-houses of a particular character within a designated period. The defendant agreed to advance to McNulty, to aid in the erection of the buildings, \$5,000, as the work progressed, and, if requested, the further sum of from \$2,000 to \$3,000, as he might deem "advisable and safe," to enable McNulty to so far finish the houses as to have the same all plastered, trimmed, and stairs up, &c.

McNulty agreed to pay by the 1st of April, 1851, the contract price of the lots, and all advances with interest, when a deed was to be given, and in case McNulty could not pay the whole in cash, he was to have the privilege of giving a mortgage on the premises for not exceeding \$5,000 of the whole amount. The contract contained this clause:—"And any bills for materials for said houses, or for other purposes, paid by said party of the first part (Bradshaw), or incurred, shall be deemed as part of the above advances."

This action was brought to recover a balance due for lumber furnished by the plaintiffs, to be used in the construction of these houses.

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The only evidence given by the plaintiffs, bearing on the questions of fact submitted to the jury, consists of the testimony of McNulty.

It will be borne in mind that he was not present at any interview between either of the plaintiffs and the defendant. He testifies to what he told the plaintiffs when he applied for lumber and to a subsequent confession of the defendant, but he does not pretend to have repeated to the defendant the statement which he testifies he made to the plaintiffs, nor does he pretend to have had any authority to make the statement, except such as may be furnished by the written contract between himself and the defendant.

He testifies that at the time he ordered the lumber he went to see if it would suit, and he told the plaintiffs that "the defendant would *see them paid* for all the lumber they would send to those buildings." That Corning went to see the defendant before any lumber was delivered, and the day after Corning so went, he called on the defendant at his office, and told him he had seen the lumber, and "he said yes, that Mr. Corning had called on him the day before, and he told him that he would see him paid for all the lumber delivered at those buildings."

This is all the evidence of the acts or confessions of the defendant, prior to the date of the last item of the bill, tending to show that the lumber was sold to the defendant on his credit and at his request. There was no evidence that the lumber was in fact charged to the defendant in the plaintiffs' books, or that a bill of the whole, or of any part of it, was rendered to him as the purchaser.

Mr. Wallis testified that he was present at the interview between Corning and Bradshaw, and heard the conversation between them. Corning stated that McNulty had applied to him for lumber for the houses, and he wanted to know the arrangement between them. That Bradshaw explained to Corning the terms of the contract with McNulty. Corning then wished to know if the defendant would become responsible for the timber and lumber to be furnished to the houses. "The defendant said he would not become responsible for anything furnished to the houses, but he would pay the orders of McNulty out of his payments as they became due."

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Assuming the witnesses to be equally entitled to credit, there is this marked distinction between the nature of the testimony which they gave: Wallis swears to what the conversation actually was between Corning and the defendant, and if he states it accurately, the defendant absolutely refused to incur any liability other than to accept McNulty's orders, payable as moneys should become due to him under the contract; McNulty, on the other hand, swears to a confession of the defendant that he had told Corning he would "see him paid for all the lumber delivered at those buildings."

To charge the defendant on this evidence, it would be necessary to hold that the jury were justified in finding that Wallis was mistaken as to what the conversation between Corning and Bradshaw really was, that McNulty stated accurately the confession of Bradshaw, that the confession was a correct version of the conversation; and to also hold that the terms of it, unexplained, *prima facie* import a purchase, or absolute agreement by defendant to pay the plaintiffs for the lumber.

The defendant introduced in evidence a bill containing the first seven items of the plaintiff's account, amounting to \$142 ¹¹/₁₆, the caption of which is in these words:

" Mr. R. McNulty,

" Bought of Brown & Corning,
" Wholesale and Retail
" Dealers in Lumber.

" Terms Cash."

On the back of it was a receipt in these words, viz.:

" Received, New York, December 7, 1850, one hundred dollars on account of within bill.

" BROWN & CORNING."

Hence it is incontestable that on opening the account the lumber was charged to McNulty, and there is no evidence that the whole of it was not charged to him. The defendant also gave in evidence a receipt, signed by the plaintiff, in these words, viz.:

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“Received, New York, January 7, 1851, of George Bradshaw, for Richard McNulty, one hundred and fifty dollars, on account of lumber furnished to Thirty-first street houses.

“BROWN & CORNING.”

All of the account was of a date prior to this receipt, except two items of the date of January 16, 1851, amounting to \$15.16. The receipt of course related substantially to the entire account, and its terms are express that the payment it evidences was made for Richard McNulty, on account of lumber furnished to these houses.

The bill of \$142⁰⁰/₁₀₀ shows that on opening the account credit was given to McNulty, and the receipt of January 7th imports that he was a debtor of the plaintiffs for the lumber on which the \$150 was paid. The statement or confession of Bradshaw, sworn to by McNulty, even assuming it to have been as sworn to by him, is entirely consistent with the existence of such a relation between the parties. Instead of raising a presumption, or justifying the inference that Bradshaw was regarded by the parties, or even by the plaintiffs, as the debtor to whom alone the credit was given, it properly only tends to show that Bradshaw undertook that McNulty should pay for such lumber as the plaintiffs might furnish him to be used in the construction of these houses.

There is certainly nothing in it tending to disprove the fact *prima facie* established by the terms of the bill of December 7th, and of the receipt of January 7th, that credit was given to McNulty for the lumber, and that he was treated by the plaintiffs as the principal debtor from the beginning to the end of the account. No explanation has been given of the fact that the lumber was charged to him by the plaintiffs, or that the only account which appears to have been rendered was made out against him as the party liable. The only other evidence which tends to prove any promise of Bradshaw, original or collateral, to pay for the lumber, is found in the testimony of McNulty, of what was promised and said at the time he assigned the contract between himself and the defendant to Terwilliger & Graham. McNulty being unable to perform the contract, sold and assigned his interest in it to Terwilliger &

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Graham, on the 21st of January, 1850, for \$150, and they undertook to execute it. Bradshaw gave his assent to the assignment. Contemporaneously with these transactions, McNulty and Bradshaw, by a written instrument, relinquished and cancelled the contract as between themselves. McNulty testified that "when the contract was cancelled, the defendant said he would pay all the bills against the buildings. He said every dollar should be paid if I would give up the contract. He said he would pay the men that day, and asked if there were any other bills on the buildings, except those for which he was accountable, mentioning that of Brown & Corning, and he said those would be paid to-morrow. He was to advance me \$150 to pay the men. He asked me about all the bills he was liable on, mentioning the bill of the plaintiffs."

Terwilliger and Mr. Wallis were present when the contract was assigned to Graham & Terwilliger, and the agreement between McNulty and the defendant was cancelled. Mr. Wallis testifies that nothing was said about the defendant's paying any bill. Terwilliger swears that nothing was said, that he heard, about the defendant paying \$150 to any one, or any money to any one. If it had been said he must have heard it. He also testified that after the assignment of the contract to himself and Graham, Corning asked him if he was going to pay McNulty's bill. He said, No. Corning said McNulty had told him that by his arrangement with Terwilliger, the latter was to pay all the debts McNulty had contracted respecting the buildings.

Mr. Wallis further testified that he had seen Corning at defendant's office after money; that Corning said he came to get money on account of McNulty, and at those interviews he heard the defendant refuse to pay the plaintiffs, because no money was due to McNulty on the contract.

The only part of the evidence of what was said at the time the contract was cancelled, which deserves to be particularly considered, is the remark said to have been made by Bradshaw, viz.: "He said he would pay the men that day, and asked if there were any other bills on the buildings, except those for which he was *accountable*, mentioning that of Brown

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& Corning. . . . He asked me about all the bills he was liable on, mentioning the bill of the plaintiffs."

Assuming these remarks to have been made precisely as they are sworn to by McNulty, they are in no way incompatible with the theory that the lumber was sold and delivered to McNulty on his credit, and on the promise of Bradshaw to pay any orders that McNulty might draw, as payments should become due to him. Whether considered by themselves or in connection with the other evidence relied upon to sustain the plaintiffs' case, they do not justify the conclusion in opposition to the legal effect of the terms of the receipt of January 7th, and of the fact that the lumber was charged to McNulty; that the lumber was sold to the defendant on his credit and at his request.

To claim that as a part of the terms and consideration on which McNulty relinquished his contract, the defendant promised to pay the plaintiffs and is therefore liable, would be an abandonment of the whole ground of action stated in the complaint. That rests on the idea of a sale of the goods to the defendant, as a purchaser of the same, at the time they were ordered.

Reluctant as we are to interfere with the verdict of a jury, in an action which has been tried and submitted, under appropriate instructions as to the principles of law applicable to the case, yet we cannot resist the conclusion that the lumber was furnished to McNulty on his application and on his credit.

That evidence, satisfactory in its character, establishes the fact that the lumber was charged to McNulty and not to the defendant; that the moneys paid by the latter to the plaintiffs, were paid by the defendant and accepted by the plaintiffs, as a payment on account of a debt owing to them by McNulty. That all the evidence is consistent with such a theory of the case, and with the testimony of Wallis, as to the conversation that took place between Corning and the defendant before any lumber was delivered. And that there is no evidence which authorizes a court or jury to find that no credit was given to McNulty, but that it was given exclusively to Bradshaw and with his assent.

We are, therefore, of the opinion that the verdict must be

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set aside and a new trial ordered. As it does not appear that the judge was requested either to nonsuit the plaintiff, or to order a verdict in favor of the defendant, the verdict is set aside purely on the ground that it is against evidence. In such a case a new trial is only granted on payment of costs. (9 Wend. 60, 17 ed. 501; 4 Hill, 104.)

A rule will be entered granting a new trial on payment by defendant of the costs of the former trial, and of the subsequent proceedings.

BENJAMIN FLANDERS, respondent, v. WILLIAM A. CROLIUS,
appellant.

The defendant before goods were delivered to his brother, told the plaintiff to let the latter have what he wanted and "he would be responsible for them," and the plaintiff therefore furnished defendant's brother goods, charging them to the defendant, and the defendant knew while the account was running, that his brother was buying goods in his name of the plaintiff, and made no objection to it. Held that a report of a referee finding that the goods were purchased by the defendant and on his exclusive credit, will not be set aside as against evidence. 17 J. R. 144. *Chase v. Day*.

Such a contract is not one to pay the debt of a third person within the meaning of the statute of frauds. It is an absolute and original contract of the defendant to pay a debt contracted by himself personally, and is valid though not in writing.

(Before DUEK, CAMPBELL and BOSWORTH, J.J.)

Oct. 18; Oct. 30.

This is an appeal from a judgment entered on a report of J. B. Scoles, Esq. as referee. The defendant moves for a new trial on the ground that the facts found by the referee are against evidence.

The facts sufficiently appear in the opinion of the court.

H. S. Mackay, for appellant.

J. W. Green, for respondent.

BY THE COURT. BOSWORTH, J.—This action was brought to recover of the defendant for goods furnished to his brother.

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The referee's report finds the facts to be, that the goods were purchased by the defendant, and that the credit was given exclusively to him. The defendant moves for a new trial on the ground that the verdict is against evidence, and insists that the evidence shows, credit was given to Joseph Crolius, and that the promise of the defendant was collateral, and not being in writing is void by the statute of frauds.

It is uncontradicted that the four bills first furnished to Joseph Crolius were obtained on written orders of the defendant directing them to be charged to himself; that they were so charged, and that the bills of them were made out against the defendant as the purchaser.

It was testified on behalf of the plaintiff, that after the goods named in the written orders had been furnished and before any others had been delivered, the plaintiff expressed to the defendant his unwillingness to deliver goods to Joseph without proper security. The defendant replied that the plaintiff might deliver goods to his brother Joseph, and "he himself would be responsible for the amount of all bills for goods sold and delivered."

This promise having been made, the plaintiff continued to furnish goods to Joseph and charge them to the defendant, from about the middle of June, 1849, to the 21st of Feb. 1850, amounting in the aggregate to about \$1100.

JOSEPH CROLIUS, a witness on behalf of the defendant, testifies, that when he had paid for the goods obtained on the written orders, he did request the defendant to say to the plaintiff that he might let Joseph have goods, and he, the defendant, would be responsible for them. But he did not hear the defendant make such a promise to the plaintiff. That he was a stranger to the plaintiff when he first obtained goods on the written orders.

He further testified, that at about the middle of the account, he told the defendant he was buying goods of the plaintiff in the defendant's name; some he had paid for and some he had not. In answer to this the defendant said, "Joe, mind and pay Flanders."

This is undoubtedly sufficient evidence until contradicted or satisfactorily explained to justify the conclusion of fact reached

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by the referee, that the goods were bought by the defendant and the credit given exclusively to him, and that such was originally the understanding of the character of the transaction had by all the parties.

The cause seems to have been tried upon the assumption, that the goods were in fact charged to the defendant as they were delivered. They are spoken of by the book-keeper of the plaintiff and by Joseph Crolius as having been so charged. No point appears among those furnished by the defendant on the argument before us, taking the ground that they were not proved to have been so charged, nor does any objection appear to have been made on the trial to the nature of the evidence given, that they were charged to defendant.

We concur in the opinion, that assuming the cause to have been tried on the assumption, as a conceded fact, that the goods in question when delivered were charged in the plaintiff's books to the defendant, the referee was entirely justified by the evidence, in finding that the defendant was the purchaser and that credit was given exclusively to him.

The testimony tends to show that before any goods were delivered except those obtained on the written orders, the defendant who had authorized the delivery of these, and directed them to be charged to himself, told the plaintiff to let Joseph have more goods, and he would be responsible for such as should be furnished. The contract therefore was directly between the plaintiff and the defendant. We think it a significant fact that this arrangement was made after all the goods had on written orders had been furnished, and before any others had been delivered. When there is connected with this the further fact that Joseph informed his brother, while the account was running, that he was buying of the plaintiff in the defendant's name, and the latter forbore to make any objection, the conclusion seems to be a just one, that all the parties understood and acted on the understanding, that the goods were furnished on the exclusive credit and responsibility of the defendant.

We do not think that the evidence relied upon as tending to show that credit was given to Joseph personally is of such a character as to overcome the effect of the evidence tending to prove that it was given solely and exclusively to the de-

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fendant, or to justify us in setting aside the report as against evidence.

The exception taken to the decision of the referee in allowing the question to be answered, appearing at folio 16, was not argued, nor is it noticed in the defendant's printed points, and we therefore regard it as having been abandoned.

The examination at the instance of the referee, appearing at folio 38, was undoubtedly made with a view to test the credibility of the witness, and for that purpose may have been proper. No point was made on the argument that the referee erred in admitting that evidence.

On the whole case we are of opinion that substantial justice has been done between the parties, and that the conclusions of fact found by the referee were warranted by the evidence.

The rule of law, on the facts as found by him, is accurately stated in his report. The motion for a new trial is denied, and the judgment entered is affirmed with costs.

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When a covenant to transport goods, and deliver them at the place to which they are destined within a limited period, contains no exception, the obligation which it creates is absolute and unconditional.

This construction is not barred by a subsequent covenant, that a certain deduction shall be made from the freight in the event of a delay in the delivery of the goods beyond the period limited.

Where the bill of lading contains a stipulation to deliver the goods in good order, "the dangers of the railroad, fire, leakage, and all unavoidable accidents excepted;" the exceptions relate exclusively to damages affecting the condition of the goods, and do not vary the obligation of the carrier to deliver them within the period limited by a separate covenant.

Hence, when the delivery of the goods is delayed beyond the time fixed by the covenant, the carrier cannot defend himself by showing that the delay was in fact occasioned by unavoidable accidents.

When there is a delay in the delivery of the goods and the stipulated reduction from the freight is not then made, but the agent having charge of the goods refuses to deliver them until the whole freight is paid, the payment thus exacted is to be regarded as compulsory, and creates no bar to a recovery of a sum as damages for the breach of the covenant, equal to the deduction that ought to have been made.

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There may be a duress of property as well as of the person, and a payment thus exacted can no more be treated as voluntary in the one case than in the other. As a general rule, when a bailee in the possession of perishable merchandise, exacts more than is due as the condition of its delivery to the owner, the money paid as the necessary means of obtaining the delivery may be recovered back, as a payment made under duress.

Covenants are alternative only when they give an election to the party bound by them to perform one or other of the acts to which they relate, so that his fulfilment of one covenant is a discharge from his obligation to perform the other.

Covenants to deliver goods within a certain time, and in case of a later delivery, to make a certain deduction from the price of transportation, are not alternative, since they give no election not to deliver the goods at all. The second covenant only fixes the measure of damages for the violation of the first.

The breach of a covenant need not be assigned in the exact words of the covenant. It is sufficient when the performance of the covenant in its true meaning and import is negatived by a necessary implication.

A variance between the declaration or complaint, and the proof, by which it is certain that the defendant was not and could not have been misled, may, under the provisions of the Code, be disregarded, without amendment, by a referee, as well, as by a judge.

Motion to set aside the report of a referee denied, and judgment for the plaintiff affirmed with costs.

(Before DUEK and CAMPBELL, J.J.)*

October 12, 18; October 30, 1852.

MOTION to set aside the report of a referee upon a case and exceptions. The action was to recover damages for the breach of certain covenants, on articles of agreement under seal between the plaintiff and the defendants. The suit was commenced before the Code, and the declaration, the sufficiency of which to cover the demands of the plaintiff was denied by the counsel for the defendants, was in the words following:—

Superior Court, of the Term of October, one thousand eight hundred and forty-six.

CITY AND COUNTY OF NEW YORK.—ss. MANUEL X. HARMONY complains of Thomas Bingham, Jacob Dock, William A. Stratton, and William Bingham, being in custody, &c., of a plea of

* Mr. Justice Bosworth having acted as referee, although present upon the argument, took no part in the decision.

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breach of covenant. For that whereas, heretofore, to wit, on the twenty-fifth day of March, one thousand eight hundred and forty-six, at the city and in the county of New York aforesaid, by certain articles of agreement, then and there made, concluded and agreed upon, between the said plaintiff of the one part, and the said defendants, by the name and description of "Bingham's Transportation Line," Dépôt No. 276 Market-street, Philadelphia, of the other part, one part of which said articles of agreement sealed with the seal of said defendants, the said plaintiff now brings here into court, the date whereof is the same day and year aforesaid, it was covenanted and agreed by and between the said parties, that the said defendants party thereto, of the first part, in consideration of one dollar, the receipt whereof by them was duly acknowledged by said defendants, and of the prices thereafter stated, would convey and transport from the city of New York to Independence, in Missouri, and would safely deliver at Independence aforesaid, within twenty-six days from the first day of April then next, any and all goods which said plaintiff Manuel X. Harmony might send by said Transportation Line, on or before the said first day of April, one thousand eight hundred and forty-six, at the following prices, to wit: two dollars per hundred pounds weight for goods in boxes, and one $8\frac{7}{10}$ -100ths dollars per hundred pounds weight for goods in bales. And, said defendants party to said articles, of the first part, further covenanted and agreed therein and thereby, that in case of the failure to deliver said goods at Independence aforesaid, within the said period of twenty-six days, the said party of the first part should deduct ten cents per hundred pounds from the freight bill for every day the goods are delayed beyond the said period of twenty-six days.

And the said defendants, in and by said articles, did further covenant and agree to and with said plaintiff, that they the said defendants would in the name of, and at the expense of said defendants, contract for and pay all freight of said goods from Pittsburg to Independence aforesaid; and that said defendants would fully indemnify and save harmless the said plaintiff, from any and all freight and expenses to be paid to third parties for transporting such goods or any part thereof between the two

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last named places, and that said defendants would fully indemnify and save harmless the said plaintiff from any lien or liens for freight, and from any loss or damage sustained by delay of such goods, by reason of such lien or liens, between the two last named places.

And, the said plaintiff avers that he, the said plaintiff, at the city and in the county aforesaid, did on or before the said first day of April, one thousand eight hundred and forty-six, deliver to and send by said defendants, by the name and description aforesaid, one hundred tons of goods in boxes and in bales, pursuant to said articles, to be, by them the said defendants, carried and transported to and delivered at Independence aforesaid, at or by the time and in manner aforesaid, pursuant to said covenant, which said goods so delivered as aforesaid, were of great value, to wit, of the value of one hundred thousand dollars.

And the said plaintiff avers, and further in fact says, that although said goods were duly shipped and sent in manner aforesaid, yet the said defendants, not regarding their said covenant and agreement, did not in fact carry and transport said goods from the city of New York to Independence, Missouri, as aforesaid, and did not deliver the said goods at Independence aforesaid, within said twenty-six days from the said first day of April, one thousand eight hundred and forty-six, as in and by their said covenant said defendants were bound and obligated to do ; but that said goods were not delivered by said defendants at Independence aforesaid until a long time, to wit, six months after the said first day of April, one thousand eight hundred and forty-six.

And said plaintiff avers, that on the arrival of said goods at Independence aforesaid, and before the commencement of this suit, said plaintiff demanded said goods of said defendants, that said defendants then and there refused to deliver said goods to said plaintiff, unless said plaintiff would pay the freight thereon : and that said plaintiff thereupon, and before the commencement of this suit, and before the delivery of said goods by said defendants to said plaintiff, at Independence aforesaid, did pay to said defendants the freight on said goods, to wit, the sum of three thousand dollars ; and said plaintiff avers that said

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payment of freight was made under an express protest and denial of said defendants' pretended right to have or claim the same or any part thereof.

And the said plaintiff further in fact says that, by reason of the delay of said defendants in making delivery of said goods at Independence aforesaid, pursuant to their said covenant, the said plaintiff was greatly hindered and delayed in forwarding his said goods to Santa Fe and other parts of Mexico, the markets where they were destined to be sent to be sold; that said goods depreciated in value by reason of such delay and non-delivery by said defendants; that said plaintiff thereby lost a profitable market and sale for said goods; and the said plaintiff was subjected to great expense in hiring and keeping men and teams at Independence aforesaid, and also subjected to the loss of his own personal time and services, to the damage of said plaintiff (including the said sum of three thousand dollars, so as aforesaid unjustly demanded by and paid to said defendants for freight, and which said plaintiff hereby claims to receive back), altogether fifty thousand dollars.

And, so the plaintiff in fact says, that the said defendants (although often requested so to do), have not kept their aforesaid covenant, so by them made as aforesaid, but have broken the same, and to keep the same have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of said plaintiff, fifty thousand dollars, and therefore brings his suit, &c.

To this declaration the defendant, Thomas Bingham, after craving oyer, and setting forth the articles of agreement, pleaded, first, *non est factum*, and second, that the plaintiff, if damnified, had been damnified of his own wrong, and appended to his pleas a notice, that upon the trial evidence would be given of certain facts therein specified, proving that the alleged delay in the delivery of the plaintiff's goods had been caused solely by unavoidable accidents, and was therefore no breach of any covenant in the agreement. In February, 1850, an order was made founded upon the written consent of the attornies, referring the cause to Joseph S. Bosworth, Esq., as sole referee, to hear and decide all the issues, and report thereon, and upon the hearing before the referee, the counsel

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for the plaintiff in support of the action, read in evidence a stipulation in writing, accompanied with certain schedules, and signed by the attornies of the parties, which stipulation and schedules are as follows:—

We hereby stipulate, upon the trial of this cause, to admit in evidence, with the same force and effect as if proved by competent testimony, the following facts (subject to all legal exceptions), viz.:

That, on Wednesday, the 26th day of March, 1846, at the city of New York, the parties to this suit executed the articles of agreement, a copy whereof is hereto annexed, marked A.

That, in pursuance of said articles of agreement, the plaintiff delivered to the defendants, at the city of New York, on Wednesday, the first day of April, in the year 1846, to be carried and transported from the city of New York to Independence, Missouri, three hundred and thirteen packages of goods, consisting of two hundred and sixty-six bales, thirty-three boxes, nine trunks, three baskets, and two kegs; containing, in all, sixty thousand five hundred and forty-eight pounds weight, as follows, fifty-three thousand and sixty-nine pounds weight in said boxes, one thousand and fifty-six pounds weight in said trunks, one hundred and eighty pounds weight in said baskets, and twenty pounds weight in said kegs; the receipt of which goods, for such transportation, was acknowledged by said defendants by a receipt, a copy whereof is hereto annexed, marked B.

That the distance from New York to Independence, by the route usually pursued by the defendants in the business of transporting goods and merchandise, is nineteen hundred and seventy-four miles; as follows, from New York to Philadelphia, by the Camden and Amboy Railroad, ninety-six miles; from Philadelphia to Columbia, in Lancaster county, in the state of Pennsylvania, by the Philadelphia and Columbia Railroad, eighty-two miles; and from Columbia to Hollidaysburg, in Blair county, in said state, by the Pennsylvania canal, one hundred and seventy-two miles; and from Hollidaysburg to Johnstown, Columbia county, in said state, by a mountain railway, over ten inclined planes, thirty-six miles; and from Johnstown to Pittsburg, in Alleghany county, in said state, by canal, one hundred and three miles; and from Pittsburg to St. Louis, in the state

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of Missouri, by the Ohio and Mississippi rivers, eleven hundred and forty-five miles ; and from St. Louis to Independence, in Jackson county, in said state of Missouri, by the Missouri River, three hundred and forty miles ; and that the usual time occupied by the defendants in transporting goods from New York to Independence is twenty-nine days, as follows, from New York to Philadelphia two days, thence to Columbia one day, thence to Hollidaysburg four days, thence to Johnstown one day and a half, thence to Pittsburg two days and a half, thence to St. Louis twelve days, thence to Independence five days.

The said Pennsylvania canal, from Columbia to Hollidaysburg, is a public work belonging to the state of Pennsylvania ; that the same lies along and is supplied by water from the Susquehanna River for the distance of forty-three miles, and by the Juniata River for the distance of one hundred and twenty-two miles : that this canal usually freezes up in the winter, and is not usually open until the fifteenth day of March of each year : that it did freeze in the winter of 1845-6. That on the fifteenth day of March, 1846, the said canal, by reason of a great and unusual freshet, was rendered impassable and not navigable ; that the same was subsequently repaired by the state of Pennsylvania, which alone had power and authority to repair the same ; and which, before the 25th day of March, 1846, gave official public notice to the defendants and others that the same would be ready for use and navigable on or before the fourth of April, 1846 ; but said canal continued not navigable and was impassable until Saturday the eighteenth day of April, 1846.

That said sixty thousand five hundred and forty-eight pounds weight of goods, in the packages aforesaid, were, by the said defendants, transported from the city of New York, on the first day of April, A.D. 1846, by the route aforesaid, and arrived at said Columbia, on the third day of April, A.D. 1846, and were then and there ready to be transported to said Hollidaysburg forthwith. That on the said eighteenth day of April, A.D. 1846, three hundred and twelve of said packages of goods were transported by said Pennsylvania canal, from said Columbia to said Independence, in the state of Missouri, and thence safely and in good order delivered to said

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plaintiff, on the 17th, 19th, and 23rd days of May, A.D. 1846, respectively, and freight paid thereon by said plaintiff, as appears by the three receipts hereto annexed, marked C 1, 2, 3.

That at the time of making said articles of agreement there was and is another route by which said goods and merchandise might have been carried and transported from the city of New York to Independence, in Missouri, to wit: by sea from New York to New Orleans, thence by the Mississippi river to St. Louis, thence to Independence as aforesaid, and that the parties to said articles of agreement knew of the same.

That the annexed schedule, marked D, contains a particular statement of the goods contained in the packages aforesaid.

Brown & Matthews, attorneys for Bingham.

John M. Platt, plaintiff's attorney.

ARTICLES OF AGREEMENT—SCHEDULE A.

Articles of Agreement, made this 25th day of March, in the year one thousand eight hundred and forty-six, between Bingham's Transportation Line, Depot No. 276 Market street, Philadelphia, party of the first part, and Manuel X. Harmony, of the city of New York, merchant, party of the second part, witnesseth, the said party of the first part, in consideration of one dollar, the receipt of which is hereby acknowledged, and of the prices hereinafter stated, doth hereby covenant and agree to, and with said party of the second part, that the said party of the first part will carry and transport from the city of New York to Independence, in Missouri, and will safely deliver at Independence aforesaid, within twenty-six days from the first day of April next, any and all goods which said Manuel X. Harmony may send by said Transportation Line, on or before the said first day of April, 1846, at the following prices, to wit, two dollars per hundred pounds weight for goods in boxes, and one $87\frac{1}{2}$ -100ths dollars per hundred pounds weight for goods in bales. And the said party of the first part covenants and agrees that, in case of failure to deliver said goods at Independence aforesaid, within the said period of twenty-six days, the said party of the first part shall deduct ten cents per hundred pounds from the freight bill, for every day the goods

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are delayed beyond the said period of twenty-six days. It is mutually covenanted and agreed between said parties, that in case said goods are lost on the rivers between Pittsburg and Independence aforesaid, the said Manuel X. Harmony shall pay freight from New York to Pittsburg on such goods, to said party of the first part, at the rate of one dollar and thirty-seven and a half cents per hundred pounds weight for goods in boxes, and one dollar and twelve and a half cents for goods in bales. The said party of the first part covenants and agrees to and with said Manuel X. Harmony, that said party of the first part, will in the name of and at the expense of said party of the first part, contract for and pay all freight of said goods from Pittsburg to Independence, and that said party of the first part will fully indemnify and save harmless the said Manuel X. Harmony, from any and all freight or expenses to be paid to third parties for transporting such goods, or any part thereof, between the two last named places; and further, that said party of the first part will fully indemnify and save harmless the said Harmony, from any lien or liens for freight, and from any loss or damage sustained by delay of such goods by reason of such lien or liens between the two last named places; and it is agreed mutually, that said Harmony is to pay no commission or other charge except the prices above stated. In witness whereof the parties have hereto set their hands and seals the day and year first above written.

(Signed) BINGHAM'S TRANSPORTATION Co.,
Wm. TYSON, Agent. [L. s.]

(Signed) M. X. HARMONY. [L. s.]

Signed, sealed, and delivered in the presence of
W. J. MOORHEAD.

RECEIPT OF GOODS—SCHEDULE B.

BINGHAM'S TRANSPORTATION LINE,
Depot, No. 276 Market street, Philadelphia.

PROPRIETORS.
Thomas Bingham, Philadelphia.
Jacob Dock, "
W. A. Stratton, "
William Bingham, Pittsburg.

AGENTS.
William Tyson, No. 10 West street,
New York.
James Wilson, Howard street,
Baltimore, Md
Harnden & Co., Boston, Mass.

Under the firm of BINGHAM, DOCK, & STRATTON.

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Received, New York, April 1, 1846, of Manuel X. Harmony, the following packages in good order, marked as per margin, which we promise to deliver in like good order, the dangers of the railroad, fire, leakage, and all unavoidable accidents excepted (Sundays excepted), at the warehouse of Wm. Bingham, Pittsburg, and consigned to ———, Pittsburg, he paying freight at the rate of ——— as contract, from New York, per 100 lbs.; and on presentation of this receipt, receiving the packages annexed, at said warehouse, to forward to Independence.

RECEIPTS FOR FREIGHT.—SCHEDULE C.

[No. 1.]

“INDEPENDENCE, May 23, 1846.

“Received of M. X. Harmony, five hundred and ninety-nine 40-100ths dollars, in full for bill of freight and advances on 156 packages of merchandise, weighing 31,522 pounds, received from Messrs. Bingham & Co. or their agents, at St. Louis, and landed at this place on the 17th instant, which merchandise I refused delivering unless my freight and advances were paid, which was acceded to without delay by said Harmony.

“E. H. DENNIS,

“*Clerk of steamboat Archer.*

“Received of CHOUTEAU & VALLE.”

[No. 2.]

“INDEPENDENCE, May 21, 1846.

“Received of M. X. Harmony, five hundred and thirty-seven 14-100ths dollars, in full for bill of freight and advances on 149 packages of merchandise, weighing 28,286 pounds, received from Messrs. Bingham & Co. or their agents, at St. Louis, and landed at this place on the 19th instant, which merchandise I refused delivering unless my freight and advances were paid, which was acceded to without delay by said Harmony.

“CHEVER,

“*Clerk of Olive Plant.*”

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[No. 3.]

“INDEPENDENCE, May 23, 1846.

“Received of M. X. Harmony, twenty-one 40-100ths dollars, in full for bill of freight and advances on 7 packages of merchandise, weighing 1,178 pounds, received from Messrs. Bingham & Co. or their agents, at St. Louis, and landed at this place on the 23d instant, which merchandise I refused to deliver unless my freight and advances were paid, which was acceded to without delay by said Harmony.

“T. O. DUNCAN,

“*Clerk S. B. Nimrod.*

“6 bales, 1 keg.”

The plaintiff's counsel called as a witness Wm. B. Morehead, who, being duly sworn and examined, testified as follows:—Is a clerk in the city of New York, was a clerk of the plaintiff in the spring of the year 1847, and went with him to Independence. I was present when a majority of the goods in question, and sent by “Bingham's Transportation Line,” were delivered to Mr. Harmony, at Independence. The delivery was made at a point on the Missouri River, at a place called Owen's Landing, about four miles from Independence.

Q. What occurred when Mr. Harmony went there to receive his goods? (This question was objected to by defendant's counsel, as calling for evidence irrelevant under the issue in this action; the referee overruled the objection, and allowed the witness to testify, whereupon the defendant's counsel excepted, and the exception was duly noted.)

A. I did not hear all that occurred. I understood what occurred—but did not hear but a small portion of it.

Q. State what you heard at that time and what you saw? (This question was also objected to by the defendant's counsel, as calling for evidence irrelevant under the issue, and also as calling for evidence of acts and declarations of the plaintiff and third persons without first showing, as the plaintiff was bound to do, that the defendant, or some person in his behalf, was there present; the referee overruled the objection, and allowed the witness to testify, whereupon the defendant's counsel excepted, and the exception was duly noted.)

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A. I heard Mr. Harmony object to pay the freight on these goods. (The counsel for the defendant renewed his objection to the declarations of the plaintiff.) Harmony said he should sue for damages, because the goods had not been delivered at the specified time ; I heard the captain of the steamboat, which had some of the goods on board, say, he was desired to collect the freight, and he should do it, before he delivered the goods. The bulk of the goods at this time were on board the steamboat, the remainder were in a storehouse on shore.

Cross-examination.—Harmony, the plaintiff, since 1846, has been engaged prosecuting a claim against the Government of the United States, for the destruction and seizure of the goods in question. I have read over the statement made by him in that claim. In that statement the cost and expenses of these goods is set down. No other valuation. There is a total amount of claim made out in that statement.

The plaintiff then rested his case.

The defendant's counsel then moved for a nonsuit, on the following grounds :—

First. That this is an alternative covenant, and there is no breach of it properly assigned in the declaration : the agreement being to deliver in twenty-six days, or deduct from the freight bill ten cents per hundred pounds, per day, the breach assigned should have negatived both alternatives ; moreover there is no evidence of a breach of both alternatives of the covenant ; there being none of a demand and refusal to deduct, and the plaintiff is therefore not entitled to recover.

Second. That whether there was or was not a demand and refusal, yet, the plaintiff having paid the freight bill in full, he either paid it in compromise and settlement of a disputed claim, and in order to deprive the defendants of their lien for the charges of transportation of the goods, and so is estopped from claiming to recover it back ; or, he paid it in his own wrong ; and in any event, if recoverable at all, it must be recovered by the plaintiff in the equitable action of assumpsit for money had and received, and not in the technical action of covenant.

Third. That the defendants being prevented, by inevitable

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necessity, from performing the contract in respect to the conveyance of the goods in twenty-six days, were excused from the obligation to deduct from the freight bill, and were not liable.

Fourth. That the receipt of April 1, 1846, referred to in the stipulation, was so far a modification of the contract of the parties, as to exempt the defendants from any detriment from delay, occasioned by unavoidable accident, and the delay now complained of being of this character, and sufficiently excused, the plaintiff was not entitled to recover.

This motion for a non-suit the referee denied, and the counsel for the defendant excepted to the decision, and the exception was duly noted.

The defendant's counsel thereupon offered to show, that about the first of April, 1846, the canal, spoken of in the articles of agreement and stipulation, was so nearly repaired, that the same might have been completed, and the goods might have been transported, and arrived at Pittsburgh, in the usual time, and within the time limited by the terms of the contract, and thence conveyed to the end of the route within 26 days, had it not been, that at that time, and after the execution and delivery of the contract, by reason of another freshet, similar in violence and extent to the first, as mentioned in the stipulation, there was a second breach in the said canal, similar to the first breach mentioned in the stipulation, and the goods in question were thereby necessarily and unavoidably prevented from being transported from Columbia to Hollidaysburgh, and detained at Columbia, from about April 4, to April 15, 1846, and thereby the delay complained of was occasioned.

To this evidence Mr. Bonney, of counsel for the plaintiff, objected, the referee sustained the objection, and the defendant's counsel excepted to the decision, and the exception was duly noted.

The defendant then rested his case.

In May, 1851, the referee reported in favor of the plaintiff, and that he had sustained damages by reason of the matters alleged in the declaration, to the amount of \$1560⁴²/₁₀₀ over and above his costs and charges.

The referee gave in writing the following reasons for his decision :

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OPINION OF REFEREE.

The question in this case is, what claim can the plaintiff make under the covenant counted upon, for not delivering within the 26 days, the goods having been actually delivered but after the expiration of the 26 days? Assuming that the bill of lading does not modify the contract of 25th of March, 1846, I think that a deduction for each day's delay should be made from the freight bill at the specified rate. An allowance at this rate would exceed the freight actually paid, or stipulated to be paid. The amounts paid to get possession of the goods are in the aggregate \$1158⁴⁴/₁₀₀. The following statement shows on what days the goods were delivered, how much on each day, the number of days' delay, the amount to be allowed at the specified rate, and the amount actually paid and when paid, viz.

Pounds weight delivered.	When delivered.	No. of days' delay	Sum to be deducted at specified rate.	Amount paid to get possession,	When so paid.
31,522 lbs.	1846. May 17	20	\$630 44	\$599 40	1846. May 23
28,286 "	" 19	22	622 29	587 14	" 21
1,178 "	" 23	24	28 27	21 90	" 23
Total 60,986 lbs.			\$1281 00	\$1158 44	

To be delivered in 26 days from the 1st of April, 1846, or on the 27th of April, 1846.

The deductions to be made at the specified rate, exceed the sums paid for freight by \$122⁵⁶/₁₀₀. The freight on the weight of the goods, as it was shown to have been by the receipts annexed to the stipulation (viz. 60,986 lbs.), assuming that in bales to weigh 53,069, would amount to about the sums paid.

53,069 lbs. in bales, at \$1 87 ¹ / ₂ per cwt.	-	\$995 04
7,917 lbs. in boxes, at \$2 " "	-	158 34
60,986 lbs. weight of goods.	Freight, \$1,153 38	

There is no covenant to pay at this rate, as well as to deduct at this rate from the freight bill. I am of opinion that under this covenant, as the failure to deliver occurred from causes

beyond the control of the defendants, their only liability is a loss of all right to any freight.

The defendants insist that the money paid by plaintiff was paid on compromise and settlement, and in order to deprive the defendants of their lien for transportation, or it was paid in their own wrong voluntarily, with a knowledge of the facts, and cannot be recovered back at all, and if at all, not in an action on this covenant. If it appeared that the defendants had actually paid the freight to the carriers for transporting the goods from Pittsburgh to Independence, so that no third persons had a lien on the goods for freight on their arrival at Independence, which would authorize them to retain the goods until the freight was paid, and that the freight was paid to defendants with a knowledge of these facts, merely because the defendants, in violation of their covenant, refused to deliver without the freight was first paid, I should feel much doubt whether the plaintiff could recover it back. (4 Cowen, 428; 4 J. R. 220; 9 Cowen, 674.) The declaration alleges payment of freight at Independence to the defendants. The fact as stipulated by the parties is, that this freight was paid to carriers, who transported the goods from St. Louis to Independence. The sums demanded and paid covered their freight, and the charges of transporting to St. Louis, which they advanced on receiving the goods at that place. They had a lien for their advances and their freight, and had a right to retain, until they were paid. The plaintiff could not by a resort to any legal remedy get possession without paying. He did not pay voluntarily or in his own wrong. The variance between the allegation and proof, has not actually misled the party to his prejudice, in maintaining his defence in this respect upon the merits. The point is, that the plaintiff was wrongfully compelled to pay and did necessarily pay the sums claimed for freight, in order to obtain possession of his goods. The declaration avers payment to the defendants. The admitted facts, as agreed upon by stipulation before the trial commenced, show that it was paid to the carriers, who had a right as against all parties to this action, as a condition to their being bound to give up the goods, to exact the payment. Actual justice requires that the plaintiff should not under such circumstances fail to recover, on account of the language in which

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the breach is expressed. Sections 169, 170, and chap. 1, of title 1, of the act of April 11, 1849, to facilitate the determination of existing suits, leave me at liberty, as I think, to disregard the alleged defect in the declaration, and I accordingly report in favor of the plaintiff for - - - - \$1158 44
and interest from May 23, 1846, to May 8, 1851, 402 08

Total, May 8, 1851, - - - \$1560 52

J. S. BOSWORTH,

Referee.

A. Mathews, for the defendant, in moving to set aside the report, insisted upon the following points:—

I. The covenants declared upon make an alternative covenant, the agreement being according to its legal effect a covenant to transport and deliver the goods in twenty-six days, or deduct from “the freight bill” ten cents per hundred pounds per day, for each day’s delay; the breaches assigned should have negatived both alternatives, but there is neither averment nor proof of refusal to deduct from “the freight bill.” (*Lowe v. Peers*, 4 Burr R. 2228; *Fletcher v. Deytch*, 2 Term. R. 32; *Slosson v. Beadle*, 7 Johns. R. 72; *Smith v. Smith*, 4 Wend. 468; *Pearson v. Williams*, 24 Wend. 244; *Pearson v. Williams*, 26 Wend. R. 630; *Farnham v. Ross*, 2 Hall R. 167; *Watts v. Shepherd*, 2 Ala. R. 425; *Jones v. Green*, 3 Young & Jer. R. 298; *Duckworth v. Allison*, 1 Mees. & Wels. R. 412; *Rawlinson v. Clark*, 14 Mees. & Wels. R. 187.)

1. The evidence offered, if it proved any cause of action at all, did not sustain the declaration, but rather showed a failure to indemnify the plaintiff “against freight and expenses paid to third parties,” and liens for freight and expenses from Pittsburgh to Independence, and beyond the defendant’s route. The plaintiff proved a payment of some freight, and advances to clerks of steamboats; but there was a failure of proof as to whether or not the deduction from “the freight bill” provided for in the agreement was made.

2. There was no proof that the captain or clerks of the steamboats were or pretended to be the agents of the defendants.

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Were they such agents to liquidate and settle this claim for demurrage?

3. The plaintiff has misconceived the effect of the covenants contained in the articles of agreement; he should have declared against the defendants for not deducting from "the freight bill" after they had failed to deliver in twenty-six days; in lieu of that the gravamen of his complaint is, that he paid freight without calling on the defendants to deduct, or giving them an opportunity so to do.

II. If it be admitted the plaintiff paid "the freight bill" in full, then he either paid it in compromise and settlement of a dispute, or he paid it in order to deprive third parties of their lien for freight and expenses; or he paid it voluntarily in his own wrong; and in any event, the covenant to deduct from "the freight bill" is waived and extinguished by the act of the plaintiff, and his remedy, if any, is in the equitable action of assumpsit, for money had and received, to recover his excessive payment. (2 Law. 419, 1 Wend.; *Russell v. Cook*, 3 Hill, R. 504; *Weyman v. Farnsworth*, 3 Barb. S. C. R. 369; *Robinson v. City of Charleston*, 2 Richardson R. 317; *Chase v. Donnell*, 7 Greenleaf, 134; 2 Sand. S. C. 475.)

III. The defendants being prevented, by inevitable necessity, from performing the contract in respect to the conveyance in the twenty-six days, were excused from the obligation to deduct from the freight bill, and were not liable. (See Stipulation; *Parsons v. Hardy*, 14 Wend. 215; *Bowman v. Teal*, 23 Wend. 306; *Beebe v. Johnson*, 19 Wend. 500; B. & Ald. 342; id. 53; 4 Wheat. 204.)

IV. The receipt of April 1st, 1846, being a contemporaneous act of the parties under the agreement, was so far a modification thereof as to save the defendants from damages resulting from delay, occasioned by "unavoidable accident;" and the delay, now complained of, being of this character, and sufficiently excused, the plaintiff is not entitled to recover. (Case, fol. 57; *Parsons v. Hardy*, 14 Wend. 215.)

V. The referee erred in the admission and exclusion of testimony.

VI. The report should be set aside, and judgment ordered for defendants.

D.—I.

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B. W. Bonney, for the plaintiff, rested his argument on the following points, which he discussed at large :—

I. The testimony of the witness Morehead was admissible, and properly received, to show under what circumstances the goods were delivered, and why the freight was paid. What was then said was part of the transaction—part of the *res gestæ*. (1 Greenleaf's Ev., § 108, 9, 10; 4 Phillips' Ev.—C. & H. notes—180 to 188, and cases cited.)

II. The motion for a nonsuit was properly denied by the referee. 1. The covenant by defendants is, first, that they will convey and deliver, &c.; and secondly, that in case of failure to deliver they shall deduct, &c. The declaration avers that defendants did not deliver, and that plaintiff demanded the goods, which defendants refused to deliver unless plaintiff would pay the freight, which plaintiff thereupon did pay, under express protest, and denial of defendants' right to claim it. The proof fully sustains the declaration. 2. The payment of the freight in full was neither in compromise or settlement of a disputed claim, nor made by plaintiff in his own wrong. Such payment was made from necessity, to obtain the goods from parties lawfully in possession, and having ostensibly a lien on the goods for the freight—against which lien the defendants had expressly covenanted to protect them—and was made under protest, and a direct assertion of plaintiff's rights. 3. That the defendants were prevented by the delay in repairing the Pennsylvania Canal from transporting the goods in time, is no excuse for the breach of their covenant. (Chitty on Contracts, Perkins' Ed. 1848, p. 734, &c.) 4. The receipt of April 1, 1846, is not, nor was it intended to be, a modification of the original covenant by defendants. It was given merely to show what goods had been delivered to defendants to be by them transported, pursuant to their contract; and this is expressly so stated in the stipulation in relation to facts. Besides, there is nothing contained in the receipt which would excuse the delivery of the goods within the stipulated time. (Chitty on Contracts, p. 734, &c.)

III. The testimony offered by the defendants was properly

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ruled out by the referee. That the injury to the Pennsylvania Canal, and the delay of the state in repairing it, caused the delay in the transportation and delivery of the goods by defendants, constitutes no defence to the action for breach of their covenant. (Chitty on Contracts, p. 734, &c.)

IV. The plaintiff is entitled to judgment for the amount reported by the referee, with interest and costs.

BY THE COURT. DUER, J.—We entirely agree with the referee, that the obligation of the defendants, resulting from their covenant to deliver the goods of the plaintiff at Independence within a stipulated period, was absolute and unconditional, and that its effect as such was not at all varied by the clause which immediately follows in the articles of agreement. This subsequent clause was plainly inserted for the benefit of the defendants, by limiting the penalty, to which, in the event of a delay in the delivery of the goods beyond the specified period, they would be liable, to a sum not exceeding the freight they would be entitled to receive, and was certainly not designed to give an election to the defendants not to perform, at all, the duty they had undertaken to discharge.

It is not necessary to deny that in construing the articles of agreement, the terms of the receipt or bill of lading for the goods must be taken into consideration, so that the two instruments may receive, if possible, a consistent interpretation. But there is in reality no variance or discrepancy that needs to be removed or reconciled. The exceptions in the bill of lading relate entirely to damages affecting the condition of the goods themselves, not at all to a loss resulting to the owner from a delay in their delivery. They are exceptions from the provision to deliver them in good order, not from the covenant to deliver them within a specified time.

The referee has very properly found that the delay in the delivery of the goods was produced by causes beyond the control of the defendants, in other words, was the result of unavoidable accidents; but he has just as properly decided, that this fact constitutes no defence to the action. By the terms of their covenant the defendants took upon themselves the risk of being able to deliver the goods within a required and specified

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period, and their failure to make this delivery, no matter from what cause it arose, was a breach of their covenant, rendering them liable in damages to the plaintiff to the entire amount stipulated in the articles of agreement.

The plaintiff must therefore be entitled to remuneration equal to the deduction from the freight to which he was entitled when the goods were delivered, that is, a sum corresponding with the amount which he then paid, unless it has been proved that he waived all claim to this deduction, at the time of the delivery of the goods, or with a full knowledge of the facts made a voluntary payment of the whole freight that was demanded.

The proof, however, that has been given, so far from warranting this conclusion, establishes the fact, that the plaintiff, when he claimed the delivery of his goods, instead of abandoning, insisted upon his rights, and that the payment then made by him, so far from being voluntary, was, in judgment of law, compulsory and coerced. As the deduction to which the plaintiff was then entitled, which was equal to the whole freight demanded, was wrongfully withheld, it necessarily follows that the defendants, who stipulated that the deduction should be made, have violated the covenant, and that the plaintiff is entitled to recover back, as damages, the whole sum with interest, which, in disregard of his protest, he was then required and forced to pay. It is proved by the witness Morehead, that when the plaintiff claimed the delivery of his goods, he objected, as he had a right to do, to the payment of any freight whatever; and that the captain of the steamboat in which the goods had been transported from Pittsburgh, refused to deliver them upon any other condition than the payment of the whole freight he had been desired to collect, and which was in reality all that would have been due had the goods been delivered in time; and the fact of such refusal is not merely proved by the witness, but is confessed in the receipts which the captain gave for the payments he exacted. It was under these circumstances that the required payment was made, and there is no pretence for representing it as made in compromise of a disputed claim, since it embraced the whole sum that was demanded. It was a payment extorted as the means of releas

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ing the goods from an unlawful detention—a payment extorted by duress, not indeed of the person, but of the property of the plaintiff.

The law upon this subject has been very accurately stated by Mr. Justice Sandford, in a case in our Reports, to which, as sustaining his own views, we were referred by the learned counsel for the defendants. In delivering the opinion of the court in the case of *Fleetwood v. The City of New York* (2 Sand. S. C. R. p. 475), that eminently learned and cautious judge admitted that there are “cases of duress of personal property in which payments for its relief are deemed involuntary, and the money may be recovered back.” He added, that although “most of these cases have arisen upon seizures of goods under revenue or excise laws, yet the principle has been extended to cases where bailees or others, who came lawfully into the possession of goods, have received more than was due before they would relinquish such possession, and that the principle is founded upon the movable and perishable character of the property, and the uncertainty of a personal remedy against the wrong-doer.” (2 Sand. pp. 479, 480.) On the subject of payments compelled by duress of property, the learned judge referred to the cases of *Chase v. Dwinall*, 7 Greenleaf, 134; *Ellicott v. Swarthout*, 10 Peters, 137; and *Clinton v. Strong*, 9 John. 340; to which many others might be added:—

It is scarcely necessary to remark, as it is too obvious to escape attention, how exactly, in all respects, the well chosen and carefully weighed language of our lamented brother is applicable to the circumstances of the case now before us. The captain of the steamboat was a bailor who came lawfully into the possession of the goods, and who exacted more than was due as the condition of their delivery. The goods were movable and perishable, and considering their character and value, their remote situation, and the nature of the commerce—the inland trade with Mexico—in which they were employed, the personal remedy of the plaintiff against the wrong-doers was, in an eminent degree, inadequate and uncertain. It would be an abuse of language, and an affront to common sense, to say that the payment thus made by the plaintiff, as the necessary and only means of recovering the possession of his property and of secur-

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ing himself from a heavy, immediate, and perhaps, in the result, irreparable and ruinous loss, can be treated as voluntary, and in denying to him upon this ground the relief that he seeks, we should violate, as it seems to us, the plainest rules of morality and justice.

Such being our views of the facts and of the law of this case, we cannot do otherwise than affirm the judgment that has been rendered, unless we are compelled to assent to the validity of the objections that remain to be stated. These objections, in our opinion, do not affect the merits of the case; but although they may be regarded as technical and formal, yet, if they are valid, it will be our duty to give them effect by a reversal of the judgment.

It is insisted that the two covenants of the defendants, the covenant to deliver the goods at Independence within a limited time, and that binding them in the event of a delay in the delivery, beyond the period specified, to make a proportionate deduction from the freight, are in their nature alternative, and that, according to the just rules of pleading, the breaches ought to have been so assigned as to negative both alternatives; but that, in reality, it is not averred in the declaration, nor was it proved upon the trial, that there was any breach of the second covenant by the refusal of the defendants to make that deduction from the freight which they had stipulated to allow.

It is a necessary conclusion from the observations we have already made, that we do not consider the covenants in question as alternative. Covenants are alternative, in the proper legal sense of the term, when they give an election to the party bound by them to perform one or other of the acts to which they relate, and by the fulfilment of one covenant to discharge himself, wholly, from the performance of the other. The covenants in question gave no such election to the defendants. The first, imposed upon them a positive duty; the second, instead of releasing them conditionally from this duty, fixed the measure of damages for its violation. The defendants had no election not to deliver the goods, as both covenants suppose the delivery to be made. The declaration, therefore, in our judgment, would have been good had it set forth only the first covenant, and claimed damages for its breach, leaving the

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defendants to answer the claim for damages, by showing either that the necessary deduction from the freight had been made, or that the plaintiff, by a voluntary payment of the whole freight, had waived his right to demand it.

The objection, however, that we are considering is untenable, even upon the supposition that the declaration ought to have assigned a breach of both covenants—for such in our opinion is its actual form. Both covenants are set forth, and a breach of each is alleged, and the refusal of the defendants to make the necessary deduction from the freight is sufficiently averred, and has been clearly proved.

We have seen that the deduction to which the plaintiff was entitled, was equal to the freight demanded and paid. The declaration therefore in averring, as it expressly does, that the plaintiff when the goods were delivered denied the right of the defendants to the freight they claimed, and made the payment under protest, avers substantially and by a necessary implication, that he claimed, and the defendants refused to make, the deduction which they had covenanted to allow. By holding the declaration to be bad and the plaintiff therefore not entitled to recover, because the breach, as assigned, negatives not the words, but only the meaning and import of the covenant, we should indeed “entangle justice in a net of form,”—a reproach that in the present age, no court of justice can be willing to incur, or be excused for meriting.

It was next insisted, that even upon the construction that we have given to the covenants of the defendant there is a fatal variance between the declaration and the proof—a variance which makes it our duty to set aside the referee's report. The declaration avers that the freight, which the plaintiff claims to recover back as damages, was paid to the defendants, whereas the proof shows, that the payment was made to the captain of the steamboat who had the goods in charge. It is not denied, however, that if the captain is to be regarded as the agent of the defendants, the declaration is properly drawn, and the averment fully sustained by the proof.

The conclusive answer, therefore, to the objection is, that the captain was the agent of the defendants; an agent, by whose acts and declarations, in our opinion, they were bound. They

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contracted personally to deliver the goods, not at Pittsburgh but at Independence, and although they were only the proprietors of the line that ended at Pittsburgh, their contract was entire and embraced the whole necessary transportation. The persons therefore whom they employed to transport the goods from Pittsburgh to Independence, and there deliver them, were their agents, for the plain reason, that they were acting at their request and on their behalf, in the discharge of a duty which they had themselves undertaken to perform. As no freight was to be paid until the final delivery of the goods, the captain of the steamboat was their agent, not merely to make the delivery, but for the collection of the freight, and as such they were bound to instruct him to demand no more than the sum that upon the arrival of the goods at Independence would be due to them under their agreement with the plaintiff. Under these circumstances the refusal of the captain to deliver the goods, upon any other terms than the payment of the whole freight, was their refusal, and the extorted payment made to him, a payment to themselves. The referee has intimated strong doubts whether the money thus paid could have been recovered back, had there been no subsisting lien upon the goods, or the payment had been made to the defendants in person, but the doubts thus expressed we are not to be understood as sharing. It is true that the case of the plaintiff is strengthened, by the fact that the captain of the steamboat had a lien upon the goods, for that portion of the freight which was due for their transportation from Pittsburgh to Independence; but had there been no subsisting lien, and had the whole freight been exacted by the defendants in person, we must still have held that the plaintiff was entitled to recover. It would still have been true, that the defendants were bailees, exacting more than was due, as the condition of relinquishing their possession of the goods; and a payment made to them under a denial of their right, and for the sole purpose of reclaiming the goods from an unjust detention, we must still have regarded as coerced, and, therefore, void and recoverable. We however agree with the learned referee that if there was any variance between the declaration and the proof, it was a variance by which the defendants were not, and could not have

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been misled, and which, therefore, under the provisions of the Code, he was justified in disregarding.

The exceptions to the ruling of the referee in admitting the testimony of Morehead, and in rejecting the evidence subsequently offered to be given by the defendants, do not require a special notice or discussion. They are shown to be groundless by the observations already made.

The judgment is affirmed with costs.

CALDWELL v. MURPHY, Survivor, &c.

In an action for an injury to the person, the circumstances, condition in life, and pursuits of the plaintiff may properly be given in evidence, in order to enable the jury to determine the extent of his actual damages.

For the same reason, an inquiry into the probable consequences of the injury, as transitory or permanent, is eminently proper.

When successive actions may be brought for a continuous wrong, the damages in each may be justly limited to those sustained by the plaintiff at its commencement.

But where for an injury to the person a single action only can be brought, the certain and probable consequences of the injury must of necessity be considered, in order to enable the jury to give to the plaintiff a full compensation.

When the judge in beginning his charge told the jury that a common carrier for the transportation of passengers is liable to the same extent as a common carrier of goods, held that the alleged error was rendered immaterial by his finally submitting the cause to the jury upon the single question whether the servant of the defendant, the driver of a stage, had been guilty of negligence.

Although the liability of a carrier for passengers is in some respects more limited than that of a carrier of merchandise, he is bound to use the utmost care, diligence, and foresight, and if by the exercise of these, an accident from which an injury or loss has resulted might have been prevented, he is liable.

The judge was therefore correct in telling the jury that the defendants were liable, unless the accident, the overturning of a stage, which occasioned the injury to the plaintiff, was the result of irresistible force or inevitable accident, plainly meaning by "inevitable," an accident which human care or foresight could not have prevented.

When the proprietors of a stage are accustomed to receive fare for the transportation of passengers on its top, they cannot impute negligence to a passenger thus seated.

If negligence were imputable to the plaintiff, as there was no pretence for saying

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that it contributed to produce the accident or injury, it was no bar to his recovery.

Motion for new trial denied, and judgment for plaintiff affirmed with costs.

(Before DUEB, CAMPBELL, and BOSWORTH, J. J.)

October 13, 14; October 20, 1852.

APPEAL from a judgment upon a verdict for the plaintiff, and from an order at special term denying a new trial.

The action was for an injury to the person of the plaintiff, occasioned by the overturning of a stage belonging to the defendants, and was tried before Mr. Justice Duer and a jury, on the 5th, 6th, 7th, and 8th days of February, 1851. The facts on which the claim for damages was founded are set forth in the complaint as follows:

The complaint of William Caldwell, of the city of New York, shows that the defendants Thomas Murphy and James Kavanagh were, on or about the fourth day of November, A. D. 1849, the owners and proprietors of a certain stage or omnibus which was licensed, authorized, or permitted by law to pass and re-pass upon the Third Avenue, in the city of New York, to any passenger for hire; that the said carriage, stage, or omnibus, was thus driven by a driver or servant of the said defendants, on the aforesaid day, upon the said Third Avenue.

That the said carriage, stage, or omnibus, was old, rotten, weak, or of bad materials, so that it was unsafe and dangerous to be used for the purpose of carrying passengers, and that in consequence of the said condition of said stage, carriage, and omnibus, and the careless and negligent use thereof, the damages and injuries hereinafter named occurred and happened to this complainant.

That the said carriage, stage, or omnibus, was carelessly and negligently driven along the said street or avenue. That the tongue or pole of the stage was broken, and the stage, carriage, or omnibus turned over or upset.

That the said plaintiff was seated upon the said carriage, stage, or omnibus, as a passenger, with Agnes Caldwell, his child; that in consequence of said overturning, or upsetting, caused as before stated, the said child of this complainant was killed, and the plaintiff greatly injured, bruised, and made

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sick, lame, and weak, and rendered unable to work or labor for a long space of time, and obliged to employ a physician, and be at great expense and trouble, so much so, that the damage which was caused by the defendants and their servant as before set forth in this complaint, has been, as he claims and alleges in pursuance of the statute in such case made and provided, and for his personal damage the sum of five thousand dollars, and he therefore prays judgment for the said sum of five thousand dollars.

The defendants, in their answer, denied that on or about the day mentioned in the complaint they employed, drove, or used, or permitted to be employed, drove, or used, any stage or omnibus for the transportation of passengers on the Third Avenue, of the unsound and bad condition mentioned in the complaint, and they denied that on or about that day any stage or omnibus belonging to them was broken or upset in consequence of such condition. They also denied that any stage or omnibus, of which they were the proprietors, was at the time mentioned broken or upset by the careless or negligent driving thereof, and they averred that the only stage or omnibus belonging to them, which was upset or broken at the time mentioned, was so upset and broken in consequence of the bad and unsafe condition of the Third Avenue, and that for damages arising from this cause they were not liable.

Upon the trial a number of witnesses were examined on both sides, and there was considerable variance and some contradictions in their testimony, but the material facts stated in the complaint, except the unsound condition of the stage, were fully proved, and the conflict in the testimony related chiefly to the condition of the road at the time of the accident, and to the question whether by proper caution on the part of the driver it might have been avoided.

The defendants' counsel moved for a nonsuit, which was denied, and in the course of the trial various exceptions were taken to the ruling of the judge upon questions of evidence. The grounds of the motion and the nature of the exceptions appear sufficiently in the opinion of the court.

On the trial the proceedings of a coroner's jury, who acquitted the owners and driver of the stage of all negligence, and

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imputed the accident solely to the bad condition of the avenue, were given in evidence, and it appeared from the proceedings and the testimony of the coroner, that Kavanagh, one of the defendants, had been summoned and had served as a juror.

When the testimony was closed, the defendants' counsel moved the court to strike out of the cause all of the evidence relating to the death of the child, on the grounds that the plaintiff had not proved any pecuniary loss or damage to have accrued therefrom. The judge thereupon decided as a matter of law, that the plaintiff could not recover any damages for the death of the child, because the statute contemplated pecuniary damages, and the plaintiff had not proved any. The cause was then summed up to the jury by the counsel for the respective parties, when the counsel for the defendant asked the judge to charge to the jury the following propositions as matter of law:

1. Plaintiff cannot recover if from the evidence the jury believe that the driver of the stage used ordinary care and prudence in its management.

2. Plaintiff cannot recover if his injury arose from the driver's negligence, coupled with plaintiff's own carelessness, misconduct, or the want of ordinary prudence or care on his part in getting on to the top of the stage after it was full. Nor if his being on the top of the stage in an exposed condition necessarily contributed to the overturning of the stage.

3. Plaintiff cannot recover if he was imprudently the heedless cause of his own injury. That to entitle him to recover, the law requires the party prosecuting to be without fault.

4. That if the jury believe that the upsetting of the stage was caused by the obstruction or unsafe condition of the Third Avenue, that defendants are not liable.

5. That in case the jury are of the opinion that the plaintiff's injury wholly arose from the driver's carelessness, they cannot take into the account of their verdict any loss of service or time subsequent to or since the commencement of this action.

The judge charged the jury, that by the rules of the common law every principal is liable for the acts or omissions of his agent, every master for those of his servant within the scope

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of the employment for which the agent or servant is retained. That these rules applied emphatically to common carriers, to which class the defendants, as engaged in the business of transporting passengers for hire, certainly belonged. As a general rule, a person who contracts to perform a particular service for a reward is responsible only for ordinary care and diligence, but the law exacts from common carriers and their servants extraordinary care and diligence, and regards its omission as culpable negligence, and hence unless the loss, with which they are sought to be charged, appears to have resulted from irresistible force or inevitable accident, they are not excused from liability. These rules had been assailed by the counsel for the defendants as harsh and inequitable, but they were found in the code of every civilized nation, ancient and modern, and were in reality founded on very manifest and sound reasons of public policy, so much so, that were they to be abandoned, or materially relaxed, the security that is now enjoyed for property and life would be greatly endangered.

The complaint in this case charged that the injuries which the plaintiff had sustained had arisen from the unsound and rotten condition of the stage and from the negligence of the driver, and if the overturning of the stage was owing to the joint action of these causes, or to the separate action of either, the plaintiff was entitled to a verdict for such damages as under all the circumstances the jury might deem to be reasonable.

That in his opinion, there was no evidence to warrant the inference that the accident was owing in any degree to the unsound condition of the stage, and consequently the sole question was, whether it was justly imputable to the negligence of the driver.

That the determination of this question seemed to depend entirely upon the credit to be given to the testimony of the driver. If it was true, as had been sworn, that the oversetting of the stage was solely owing to the sudden rolling of a heavy stone from the top of the bank, the accident might properly be regarded as one that could not have been foreseen or guarded against, and for the consequences of which, therefore, neither the driver nor the owners were responsible. But on the other hand, if the stone, when struck by the wheel of the stage, was

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lying in the road, it seemed impossible to deny that the accident might have been avoided in the exercise of that care and diligence which the driver was bound to use. Upon this supposition he saw no escape from the conclusion that the injuries to the plaintiff resulted from the negligence of the driver, and therefore that the defendants were bound to compensate him.

That the jury must judge for themselves whether the statement made by the driver was not highly improbable, and wholly inconsistent with the testimony of other and disinterested witnesses. The driver was in truth swearing to discharge himself, and in judging of the credit due to him, it was a material circumstance that no such explanation had been given by him, when examined before the Coroner. That in judging of the conduct of the driver, the jury were not to be at all influenced by the verdict of the Coroner's jury. The proceedings before the Coroner were not evidence of themselves, and they had been so conducted as to deprive them of all claim to consideration.

That if the jury should arrive at the conclusion that the overturning of the stage was owing to the want of due caution on the part of the driver, the bad condition of the road afforded no excuse, nor did the circumstances of the case furnish any ground for the assertion that the accident was owing to any negligence on the part of the plaintiff. He was not to be deprived of damages because he had taken his seat on the top of the stage, or had failed in the confusion and terror of the moment to adopt the best course for extricating himself and his child from the peril. That if the jury, under the instructions given to them, should be of opinion that plaintiff was entitled to recover, they would wholly lay out of their view the death of plaintiff's child, and would only take into their consideration in making up their verdict, plaintiff's personal sufferings and injuries of body, including his loss of service or labor, and his continuing or probable permanent disability and loss, together with the amount expended by him in his sickness for medicine or other attendance and necessaries, and would allow him therefor, as his actual damages, a full and liberal compensation.

The judge then refused to give any more specific answer

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than that contained in his charge to the several propositions of law, or any of them, submitted by defendant's counsel. Defendant's counsel thereupon excepted to each and every part of the charge of the judge, and did also except to his several refusals to charge the jury, as above severally requested, and such and every of said exceptions were duly entered.

The jury found a verdict for \$625 as damages.

T. Darlington, for the defendant Murphy, now insisted that the verdict ought to be set aside and new trial be granted, and rested his argument principally upon the grounds stated in the opinion of the court.

D. E. Wheeler, for the plaintiff, contra.

BY THE COURT. CAMPBELL, J.—It was said in *Myers v. Malcolm*, which was an action to recover damages for injury to the person, that evidence of the wealth of the defendant was inadmissible, because the plaintiff was entitled in that case to recover the actual damages he had sustained without regard to the ability of the defendant to pay them, and such is the general rule in cases free from malice or wilful negligence. But, in relation to the plaintiff, the case is widely different. As to him, it is often necessary to inquire into his condition in life, his habits, pursuits, and necessities, in order that the jury may determine what actual damage he has sustained. The loss of a limb might produce equal pain to two men, but the actual damage which that loss would occasion, when we are called upon to estimate that damage in dollars and cents, would depend very materially upon the pursuits and condition in life of the party claiming to recover such damage. In *Foot v. Tracy*, 1 John 53, Kent, J., says, "The jury have, and must inevitably have, a very large and liberal discretion in apportioning the damages to the rank, condition, and character of the plaintiff, and they must have evidence touching that condition and character, so as to have some guide to that discretion." (See *Lincoln v. Saratoga & S. R. R. Co.*, 23 Wend. 425). In estimating that damage also, it is very manifest that a most important inquiry must be, whether the injury which the plaintiff has sustained is

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of a temporary or of a permanent character. Where successive actions may be brought for a continuous wrong, as in the case of a continued trespass upon land, the damages in each suit are very properly limited to those sustained by the plaintiff at its commencement, but for an injury to the person, resulting from a single act, a single action only can be brought, and it would therefore be manifestly unjust not to take into consideration upon the trial the nature and extent of the injury in all its consequences, since, by not so doing, the plaintiff in many cases would be deprived of the larger portion of the compensation he might justly claim, and the damages given be wholly disproportioned to the injury sustained. The ruling of the judge on the trial, admitting evidence on both these points, we therefore think was correct. Another question put to one of the witnesses, inquiring what had been the condition of the plaintiff as to health since the injury, was objected to, and application was made to strike out the answer of the witness, which answer was, that the plaintiff has since invariably complained, and which application to strike out was refused by the judge. It was, perhaps, not very material, and was not much pressed upon the argument. The complaint of pain and suffering connected with the appearance of the injured party, form the means of judging as to his physical condition. The witness to whom this question was addressed had attended on the plaintiff as a friend during the period immediately following the injury, and had aided in lifting him in and out of bed, and saw him frequently after he was able to leave his house, and had therefore the best means of learning whether such complaint was real. We think it was proper evidence for the jury under the circumstances. The judge charged the jury that, as a general rule, common carriers transporting passengers for hire are liable for damage to the persons carried, unless the same resulted from inevitable force or inevitable accident, but in this case, he added, that the sole question was whether the accident was justly imputable to the negligence of the driver. It was contended by the defendant's counsel that there is a wide difference between the liability of common carriers of merchandise and of carriers engaged in the transportation of passengers, that while, by the common law, the rule, originating in motives of public policy, was that the

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former were rendered liable for loss, except occasioned by the act of God or the king's enemies, it was much less stringent in reference to the latter class of carriers, and they are not liable if they use ordinary care and prudence in the management of their vehicles. In *Ingolls v. Bills and others*, 9 Metcalf 1, the Supreme Court of Massachusetts examined with much care, and commented on many of the leading cases, and they say in conclusion: "The result to which we have arrived, from the examination of the case before us, is this—that carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harness, horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against." Having thus provided the means of transport, they are in like manner bound to use the utmost care and diligence in the managing, directing, and using those means, so that, as far as human care and foresight can go, they may guard against injury. Having done all that human care and foresight can do, and loss happening, they are not liable. Pure accidents will excuse them. They are not answerable, at all events. Human life is too valuable to be required absolutely at the hands of those who have done all that the utmost care and foresight can do for its protection. But the magnitude of its value, at the same time, requires of carriers of passengers such extreme care and foresight. The charge of the judge that the law exacted from common carriers of passengers extraordinary care and diligence, and that they are liable, unless the injury arises from force or pure accident, was entirely correct. We do not deem it necessary to enter upon a review of the cases, but we think they will be found to support this view. See *Christie v. Griggs*, 2 Campbell 79; *Aston v. Heeren*, 2 Esp. R. 533; and *Ingolls v. Bills*, 9 Metcalf 1, and cases there cited.

At the present period, when the lives of so many hundreds of people are intrusted to the carriers of passengers by steamboats and railroads, and when accidents and disasters are so lamentably frequent, it is no time to relax a rule so salutary and so necessary for the public safety.

There was no evidence tending to show that the plaintiff was D.—I.

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guilty of negligence. He was on the top of the stage with many others by the consent of the driver, who collected his fare from them; and, when the owners of a stage agree to transport passengers upon the top, they have assuredly no right to impute negligence to a passenger thus seated. It appears, also, that there were seats for passengers on the top of the stage. The negligence of the plaintiff, if there had been any, in order to excuse the defendant, must have been such that it directly concurred in producing the injury. It can hardly be pretended that it did so. The comments of the judge upon the evidence seem to have been fairly warranted. The testimony of the driver was contradicted in material points by that of two or three other disinterested witnesses. The credit to be given to him was, however, left to the jury, and the whole case was, we think, fairly submitted. The other objections that were taken on the trial, and partly urged on the hearing before us, have seemed to all of us so evidently groundless as not to require a special notice. The judge, at the close of the testimony, decided that the plaintiff could not recover any damage for the death of the child. The verdict of the jury was for \$625, and considering the plaintiff's injury was not large. We are unable to see any reason for a new trial.

The judgment for the plaintiff is therefore affirmed with costs.

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Mere irrelevancy in an answer is not a ground of demurrer.

When an answer containing irrelevant matter is demurred to, if it contain a valid defence which may be separated from the irrelevant matter, the demurrer must be overruled.

The dismissal by the Court of Appeals of an appeal for want of prosecution, is not, in judgment of law, an affirmance of the judgment appealed from.

Hence in an action for a breach of the undertaking given on the appeal, an averment in the complaint that the judgment was affirmed is not sustained by the admission or proof that the appeal was dismissed.

The undertaking which the Code requires upon an appeal from the terms in

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which it is expressed, cannot be construed as broadly as the bond which the R. S. required to be given on bringing a writ of error.

It is limited to the affirmance of the judgment, and a judgment is not affirmed until the appellate court, upon an examination of its merits, has by a proper sentence declared its validity.

Held, that as the answer in this case denied the affirmance of the judgment, and averred the dismissal of the appeal, it contained a full defence.

Judgment at special term overruling plaintiff's demurrer affirmed with costs.

(Before DUER, CAMPBELL, and BOSWORTH, J.J.)

October 15; October 30.

THIS was an action against the defendants for the breach of an undertaking, executed by them as sureties of one Robert Anderson, upon an appeal made by him to the court of appeals, from a judgment of this court. The pleadings are as follows:—

The plaintiffs complaining, respectfully show to this court, that on the fifteenth day of May, 1849, judgment was rendered at a general term of this court, in favor of the above named plaintiffs, against one Robert Anderson, for the sum of one hundred and forty-nine dollars and ninety-eight cents, and that on the first day of February, 1850, the said Robert Anderson appealed to the court of appeals from the said judgment, and that upon said appeal, the said Joseph Husson and Daniel N. Dugan, made and executed an undertaking in the words following, that is to say:—

Robert Anderson, against William Watson, James P. Drummond, William T. Johnson. The plaintiff appeals to the court of appeals from the final judgment of nonsuit, made by the Superior Court of the city of New York, at a general term thereof, which judgment was for costs only to one hundred and forty-nine dollars and ninety-eight cents, and entered and docketed the fifteenth day of May, 1849, in the city and county of New York; now we, the subscribers, hereby undertake, that if the judgment appealed from, or any part thereof, be affirmed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal, and that the appellant will pay all costs

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and damages which may be awarded against him on the appeal, not exceeding two hundred and fifty dollars.

New York, Feb. 1st, 1850.

(Signed,)

JOSEPH HUSSON.

(Signed,)

DANL. N. DUGAN.

And that the said undertaking was duly acknowledged before a commissioner of deeds, in due form of law, by each of the said appellants, and was accompanied by the affidavits of the sureties that they were each of them worth double the amount specified therein.

And the said plaintiffs further show, that by an order of the said court of appeals, made on the 25th day of February, 1850, the said appeal was dismissed, and the judgment appealed from was in all respects affirmed, and that the appellant has not paid the amount directed to be paid by the said judgment. Wherefore the said plaintiffs pray judgment for one hundred and forty-nine dollars and ninety-eight cents, with interest, from the 15th day of May, 1849, and costs.

The defendant Husson put in the following separate answer :

And this defendant, for his own separate answer to the said complaint, states upon his information and belief, that before the commencement of this suit, in the said complaint mentioned, and on or about the third Monday of June, 1840, William T. Johnson, one of the plaintiffs in this action, commenced a suit against the said Robert Anderson, in the court of Common Pleas, in and for the city and county of New York, in which suit the said Robert Anderson appeared by S. F. Clarkson, his attorney, and defended the same; and such proceedings were thereupon had in the said court, that the said Robert Anderson, by the consideration and judgment thereof, recovered the sum of \$105 $\frac{1}{4}$, for the costs and charges of his defence in said suit. That thereupon, and on or about the first Monday of January term, 1842, the said William T. Johnson had, and prosecuted out of the Supreme Court of judicature of the people of the state of New York, a writ of error, to remove

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into the said Supreme Court, the record of the judgment recovered by said Anderson, in said court of Common Pleas; and upon said suing, and said writ of error, the said William T. Johnson, James P. Drummond, and William Watson, gave their bond to the said Robert Anderson, pursuant to the statute in such case made and provided.

That the said Robert Anderson appeared upon said writ of error, by S. F. Clarkson, his attorney, and defended the same, and such proceedings were thereupon had that the said Supreme Court affirmed the judgment of the said courts of Common Pleas with costs, and the judgment on that affirmance was docketed on or about the 28th day of January, 1843, for \$174⁹/₁₆, that both judgments were for costs only, and that the said Samuel F. Clarkson, as the attorney for said Anderson, in said suit, in said court of Common Pleas, and also in the writ of error so issued out of the said Supreme Court, had a lien and claim upon said two judgments, for the full amount thereof, of which facts the said defendants had due notice, long prior to the date of the release hereinafter mentioned.

That a suit was commenced on or about the thirtieth day of January, 1843, in this court, by the said Anderson, against Johnson, Drummond, and Watson, by the said Samuel F. Clarkson, his attorney, on the said bond so given on the aforesaid writ of error, sued out of the said Supreme Court, at which time said Anderson was a resident in the city of New York; and pending the said suit, said Watson made a motion in the said Supreme Court to off-set the judgments mentioned in the following order, and thereupon the said court made an order, as follows:—

“After hearing counsel for both parties, on plaintiff’s motion, that he have leave to set-off so much of the judgments entered in the Supreme Court of the city of New York, recovered by James P. Drummond and William Watson, against Robert Anderson, for \$295 29, as may be necessary against the judgments in this court in favor of said Robert Anderson, against said William T. Johnson, for \$174 05, and the costs of affirmance; ordered that said motion be granted, so far as respects the costs adjudged to the defendant in this case, on the affirmance of the judgment in this case, in December, 1845, by the Court of

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Errors, leaving the attorney for the defendant in this cause, to take his remedy against the plaintiff therein, for the costs adjudged against said plaintiff in 1843, the amount of which is \$174 05, without costs of this motion to either party; that on or about the 29th day of January, 1849, the said plaintiff in this action, or some, or one of them, acting on behalf of the others, or other of them, after due notice, that said judgments were subject to the lien of said S. F. Clarkson, the attorney of said Anderson, on the aforesaid suits, by fraud and collusion with said Anderson, obtained from him, without any valuable or valid consideration, a release of that date, by means of which release the said plaintiffs in this suit were enabled to, and did defeat the said suit in said Superior Court, upon said bond, and procured a judgment of nonsuit against said Anderson, which is the judgment mentioned in said complaint.

“And this defendant further answering, says, that he admits on the 15th day of May, 1849, a judgment, which has been twice adjudged to have been obtained wrongfully and collusively by the above plaintiffs, and was and is void as to the real party in interest, was obtained against Robert Anderson, the then nominal party, for the sum of \$149 98, in this court, of which two decisions the said Watson had notice, that the real party in interest gave notice in the name of said nominal party Robert Anderson, of an appeal from the aforesaid judgment to the Court of Appeals.

“And from information, this defendant believing said Watson well knew said suit was not prosecuted by said Anderson, but by the real party in interest; that the said suit was commenced in this court in January, 1843, before the Code came into operation, and was brought to recover costs alone which had been adjudged by the Supreme Court of this State, to belong to Samuel F. Clarkson, the attorney at law, in said suit of Robert Anderson, the nominal party, of which adjudging and decisions the said Watson also had notice as this defendant is informed and believes. That after said notice of appeal to the Court of Appeals, the transcript from this court could not be and was not procured in season to comply with the second rule of the Court of Appeals, so as to invest and give the said Court of Appeals the possession of and jurisdiction over said

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judgment appealed from, and thereupon, on the 25th day of February, 1850, the said William Watson (one of the above plaintiffs, and acting as attorney and counsel for those defendants), caused to be entered in the clerk's office of the said Court of Appeals, an order, entitled, and as following, to wit:—

“On filing an affidavit of William Watson, proving that the appeal in this cause was perfected on the second day of February, and a certificate of the clerk that no return has been filed in the Court of Appeals: it is ordered that the appeal from the judgment in this cause be dismissed for want of prosecution, with costs to be taxed. That this defendant denies the statement in the complaint in this action, made as follows: ‘And the judgment appealed from was in all respects affirmed.’

“And this defendant further answering, says, that said Watson had, on or about the 13th March, 1850, all the costs for said dismissal, by said Court of Appeals he was entitled unto, under and by virtue of the said order dated February 25th, 1850, taxed at the sum of \$27 30, which amount was paid to said Watson on the said 13th March, 1850, he giving his receipt therefor, without then or since claiming any further amount of money, for or by reason of said notice of appeal, until the commencement of this action.

“And this defendant further answering the said complaint, says, that he has not sufficient knowledge to form a belief whether he signed the undertaking as set out in said complaint, but this defendant did not sign any undertaking at the request, directly or indirectly, of the said Robert Anderson, but for Samuel F. Clarkson, the person known by said Watson to be the real party in that suit. To this answer the plaintiffs interposed the following demurrer:—

“And as to the defence of the said Husson, by him first above pleaded and contained on the first and second pages of his answer, to the words ‘And this defendant,’ on the fifth line, from the bottom of said page, the said plaintiffs demur to the same for insufficiency. And they assign the following causes of demurrer:—

“That the said part of the defendant's answer is not a statement of any new matter constituting a defence, or set-off, to the matters alleged in the complaint. That it contains nothing

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whereby the plaintiffs should be barred from having or maintaining their aforesaid action.

“And as to that part of the said answer that immediately follows the portion above demurred to, to the words, ‘And this defendant further, on information,’ on the 25th line of the fourth page of the said answer, secondly above pleaded, the said plaintiffs demur to the same, and they assign the following causes of demurrer:—

“That it professes to admit facts stated in the complaint which are not therein stated, there being no statement in the complaint that a judgment of the 15th day of May, 1844, had been twice, or at any time adjudged to have been obtained wrongfully, or collusively by the plaintiffs.

“That the said defence secondly demurred to, is not a plain and concise statement of any new matter constituting a defence, or set-off, without unnecessary repetition, but is an obscure and prolix statement, with unnecessary repetition of facts and occurrences, which, if properly pleaded, would constitute no defence or set-off to the averments in the complaint.

“That it sets forth the payment of \$27 50, costs on the dismissal of an appeal, when no demand is made in the complaint of such costs, nor is the suit brought to recover said costs.

“That it denies the execution of the undertaking mentioned in the complaint, and alleges new matter as a defence to the said undertaking.

“That it is informal, and insufficient in every respect.”

At a special term of the Superior Court of the City of New York, held at the City Hall, in the city of New York, on the 24th day of April, 1852.

Present,

W. W. CAMPBELL, *Justice*.

The demurrers to the first and second defences set up in the separate answer of the defendant, Joseph Husson, having heretofore been brought on for argument pursuant to notice, and after hearing Wm. Watson, of counsel for the plaintiffs, and S. F. Clarkson for the defendant, Joseph Husson, and upon due deliberation had, and upon the affidavit and order to show cause as to the settlement of the order and judgment in this

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action, it is ordered that the demurrer of the plaintiffs, as to the first defence, is allowed; and that the plaintiffs' demurrer as to the second defence, in said Husson's answer, is hereby overruled—the costs to abide the event of this action—and the order to show cause and to stay proceedings, is hereby vacated and discharged without costs on said order, to show cause to either party. Either party may be at liberty to amend in ten days.

(A Copy.)

R. G. CAMPBELL, *Clerk*.

The plaintiffs appealed to the general term from part of the above order, which overruled the demurrer to the second defence, and this appeal was now heard.

W. Watson, for plaintiffs, made and argued the following points—

I. The matters set forth between folios 15 and 22 of the answer, are insufficient and improperly pleaded.

1. They are a reiteration of the matters contained in the first defence, which has been overruled.

2. The said answer alleges the payment of \$27 30 costs, which are no part of the plaintiffs' cause of action, and are not demanded by the complaint.

3. It denies the execution of the undertaking, and alleges new matter in avoidance of the same. (*McMurray v. Gifford*, 5 How. Pr. R. 15. *Benedict v. Seymour*, 6 Pr. R. 303.)

4. The denial that the judgment was affirmed is insufficient. The answer should deny that it was affirmed in part, as well as that it was in all respects affirmed. (*Hopkins v. Everett*, 6 P. R. 159.)

II. These are defects of which advantage may be taken in an answer by demurrer. (Code, sec. 153.)

III. The said answer contains nothing in bar of this suit, because,

1. By a dismissal of the appeal, the judgment below is affirmed. Rules of the Court of Appeals, 2, 7, which provide, that in cases of dismissal, the court below may proceed as though there had been no appeal.

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2. More than two years since the judgment have elapsed, and no appeal will now lie. (Code, sec. 331.)

IV. The Code, which includes the law in regard to appeals, is a remedial statute, and will receive a liberal or equitable construction. The whole statute will be taken together. The reason and spirit will be considered. The letter may be enlarged or restricted to effectuate the intent. Ex. "Executors" held to include "Administrators." All persons may devise—Held not to include infants and femmes coverts. (Dyer, 54. Pow. Dev. 142. Leases by Bishops, &c., 1 Bl. 87—1 Kent Com. 7th ed. 462–5. Bac. Ab. St. 1, 6, 7. Plow. 365, 465. 3 Coke, 7.)

S. F. Clarkson, contra, for defendant.

I. That part of the answer of defendant Husson which is included in the second demurrer, embraces different and distinct defences; therefore, if any matter of defence embraced in this second demurrer is good, the demurrer must be overruled, for it cannot be good in part and bad in part. (12 Wend. 169. 1 Denio, 428, *Freeland v. McCullough*.)

II. The answer sets forth the order of the plaintiffs, obtained in the Court of Appeals, the 25th day of February, 1850, and it shows that the appeal was dismissed, for no return was filed, and that the judgment was not affirmed. The undertaking set out in the complaint is, to pay only on affirmance. (4 Cowen, 711. 19 John. R. 455.)

III. The denial by this defendant of the allegation in the complaint, "and the judgment appealed from, was in all respects affirmed," formed a good issue, and therefore the demurrer should be overruled, if other reasons did not exist against the demurrer. (12 Wend. 169. 1 Denio, 428.)

IV. The complaint sets out that part of the undertaking "that the appellant will pay costs and damages which may be awarded on appeal;" therefore, this defendant had a right to set forth in his answer, that on the 13th March, 1850, he paid all the plaintiffs demanded, under that order of 25th February, 1850—that is \$27 $\frac{3}{4}$ —and this demurrer is not good to this part of the answer.

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V. Judgment must be given, on demurrer, against the party who commits the first fault in pleading. (*Wyman v. Mitchell*, 1 Cowen, 316. *Griswold Ins. Co.*, 3 Cowen, 96.)

1. Here no demand is stated in the complaint to have been made before this action, though the defendant is surety. (*Douglass v. Rathbone*, 5 Hill, 143-4.) A demand is parcel of the contract.

2. No breaches are alleged and set forth in the complaint, as the statute requires. (2 R. S., p. 378, sec. 5. *Reed v. Drake*, 7 Wend. 345. *Nelson v. Bostwick*, 5 Hill, 39, 40. *Barnard v. Darling*, 11 Wend. 27.)

VI. The judgment below should be affirmed, with costs.

BY THE COURT. DUER, J.—The portion of the answer to which the demurrer is taken doubtless contains much irrelevant matter, which, as such, had the proper motion been made, must have been stricken out. But the issue of law which the demurrer raises is, that admitting all the facts set forth in this portion of the answer to be true, they constitute no defence, and, consequently, if a valid defence may be extricated from the irrelevant matter, this issue must be determined against the plaintiffs. In other words, the judgment at special term overruling their demurrer must be affirmed. (*Smith v. Grenien*, 2 Sand. S. C. R. p. 700; *Fry v. Bennett*, 5 id. 62.) The undertaking of the defendants is in the words of the Code, and bound them to satisfy the judgment to which it refers, in case it should be affirmed in the Court of Appeals, and the complaint avers that the judgment is so affirmed; and that the defendants have not paid its amount, and therefore prays for judgment against them. The answer, *inter alia*, denies the affirmance of the judgment, and avers in effect that the only order made in the Court of Appeals was an order dismissing the appeal for want of prosecution, and the plaintiffs, by demurring, admit that such was the fact.

It follows from this statement, that unless we are bound to say that the order dismissing the appeal is equivalent in law to an affirmance of the judgment, there has been no breach of the defendants' undertaking, and the plaintiffs are not entitled to maintain this action. A judgment affirmed in the court of ultimate jurisdiction can never again be questioned; and if the effect

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of the dismissal of the appeal was to preclude any further examination or impeachment of the judgment, it might reasonably be contended that the averment in the complaint that the judgment was affirmed, is sustained by the admitted fact, that the appeal was dismissed. It is not pretended, however, that such was the effect of the dismissal of the appeal. It is not denied that its only effect was to replace the judgment in its former condition, leaving its merits still open to examination upon a second or further appeal; and it is impossible for us to say that a judgment has been affirmed which, after the appeal was dismissed, was still liable to be reversed. The allegation that by the lapse of time an appeal is now barred, is plainly irrelevant. The barring of an appeal by the lapse of time is not an affirmance of the judgment by the appellate court, and it is to such an affirmance only that the undertaking relates.

The bond which the Revised Statutes required to be given, when a writ of error was brought which was intended to operate as a stay of execution, not only bound the parties to satisfy the judgment, in case it should be affirmed, but also in case the plaintiff in error should fail to prosecute the writ, or the same should be quashed or discontinued (2 R. S. 596, § 28), and why these additional and very significant provisions have been omitted in the Code, we have been unable to discover, and are at a loss to imagine. We cannot believe that they were rejected by the framers of the Code, as superfluous, in the belief that they were all virtually comprehended in the affirmance of the judgment. If they really intended that the undertaking upon an appeal should be construed as largely as the bond upon a writ of error, it is to be regretted that they have not expressed themselves in terms that could enable us to carry their intention into effect. We cannot depart so far from all sound and safe rules of interpretation, as to adopt a construction which is plainly inconsistent with the settled and sole meaning of the words they have chosen to employ. To affirm a judgment is by the judicial sentence of an appellate court to declare its validity, and it is a legal solecism to say that a judgment has been affirmed, when the question of its validity is exactly that which the appellate court refused to consider. The Court of Appeals has said that the appeal should be dismissed; but as it has not

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said that the judgment is either valid or erroneous, we have no more right to say that it has been affirmed than that it has been reversed.

The judgment at special term is affirmed, with the usual liberty to the plaintiff to withdraw the demurrer upon payment of costs.

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When usury is specially pleaded, the proof must correspond, in all respects, with the allegations in the answer. If there is any variance, the defence must be overruled.

The court will not amend an answer after a trial so as to let in the defence of usury against a holder, for value and without notice, of negotiable paper.

When the execution of a promissory note, and its possession by the plaintiff as an endorsee, are admitted, a denial that he is the lawful owner, without averring a title in any other person, is irrelevant and frivolous.

Under the Code, there is no general issue under which facts, in their nature constituting a defence, but not averred in the answer, may be given in evidence.

Facts, tending to prove that a promissory note, or any other contract, was void in its origin, on the ground of usury, fraud, &c., are in their nature as certainly matter of defence, as facts barring the action which subsequently arose. There exists, therefore, the same necessity for averring them in the answer upon these grounds. Exceptions to the charge of the judge upon the trial overruling a defence of usury disallowed, and judgment, in favor of the plaintiff, affirmed with costs.

(Before DUER, CAMPBELL, and BOSWORTH, J.J.)

October 18. November 20.

THE complaint alleges that on the 24th day of February, 1851, the defendant drew a note to his own order, and endorsed the said note, and transferred the said note so endorsed, so that the same came to the possession of and was owned by the plaintiff; whereby he promised to pay at the Merchants' Exchange Bank \$819 68. That said note became due and payable before the commencement of this action, and the defendant has not paid the same, and is justly indebted to the plaintiff, who is now the lawful holder and owner of the note, in the sum of \$819 68, with interest from July 27, 1851, and costs of this action.

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The answer admits the making of the note, but denies all the other allegations in the complaint.

The answer then sets up usury in the transactions between S. Davenport and Wm. A. Beecher in the first negotiation of the note; and that the defendant received no value for the note, and that the note had been misapplied; and that defendant offered to pay Beecher the amount by him loaned, with interest on the note in suit, and a note for \$840 16, and a note for \$590 16, and that Beecher refused to receive the same without the usurious premium, and claimed that there was then due him \$500 and upwards for the loan and forbearance; that the note for \$840 16, and the note for \$590 16, have been paid, and \$667 50 has been paid on the other notes, and that Beecher received \$170 and upwards for usurious premiums on the loans.

The reply denies that loans were made to defendant upon the note, as collateral security upon an usurious agreement with Beecher.

The reply also denies that defendant offered to pay Beecher the loans made by Davenport, with seven per cent. interest, or that Beecher refused to receive the same, or claimed there was due him for forbearance \$500 or upwards, or that Beecher had received for usurious premiums \$170 and upwards.

The reply also denies the note is void, and the plaintiff charges he has not sufficient information to form a belief as to the other matters set up in the answer.

The plaintiff then charges that said note was regularly transferred in the ordinary course of business, and was taken for full value duly paid therefor, without any usury or illegality whatever, and that he is the true and lawful holder of said note in good faith, and entitled to recover thereon in the manner prayed for in his complaint.

The action was tried May 17, 1852, before the Hon. Lewis H. Sandford and a jury.

The execution and endorsement of the note were admitted, and read in evidence.

The defendant then called as a witness, Silas M. Crandall, who testified, that he received the note in question, and other notes from the defendant, and gave that note and the other notes to Silas Davenport, to raise money upon. The defendant

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received nothing upon them. He gave to Davenport, at the same time, the note in action, and another note made by the defendant for \$736 93, a note made by R. Heslewood for \$450, and a note made by Schlosser for \$117 50.

On his cross-examination, he admitted that the defendant received no consideration for his notes; one of the other notes, the Schlosser note, was a regular note, the other was not; that the defendant did not give both notes at the same time; that the note for \$819 68 was given after the other; that he gave these notes to Davenport some time in March, 1851; that he gave him no other notes at that time to raise money upon for him; that he was to give the defendant the money for his notes; there was no time mentioned when he was to give him the money, nor any particular money that he was to give him; that the defendant was to have the money when he wished, and that he had the right to call for the money at any time; that he never paid the defendant for the notes; that he would have paid the defendant if he had called for it, and that he had got the money; the notes were for his benefit thus far, that he could use the money till defendant called for it.

Silas Davenport testified, that he got the note in action for \$819 68, and a note of the defendant's for \$736 93, and a note of Heslewood's for \$450, and one of Schlosser's for \$117 50, about the 18th March, 1851; that he received these notes from Crandall; on the 18th March, 1851, he received from William A. Beecher, \$1,500 on these notes, and that he gave him his memorandum check for \$1,500, dated March 18th, 1851, and left with him the above-mentioned notes; that he borrowed the money on the security of these notes; that he borrowed it on the 18th day of March, 1851; that he did not recollect of any specific agreement made at the time of this loan between him and said Beecher; that he had made several loans of him at several times previously, which were at eighteen pence per day on one hundred dollars.

This testimony was objected to by the plaintiff's counsel, and the court held it to be immaterial, unless there was something proved to connect this affair with those loans or terms.

That on the 9th day of April, 1851, he paid Mr. Beecher \$500, and he returned him the defendant's note for \$736 93,

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and he paid him \$51 88, for the use of the \$1,500, from the 18th March, 1851, to that day, according to his memorandum, and gave Mr. Beecher a new memorandum check for \$1,000, dated April 9, 1852. Mr. Beecher gave him no money that day.

A question was then put as to what agreement was made on the 9th day of April, 1851, between the witness and Mr. Beecher, respecting the interest upon the loan of \$1,000; but the court, on the objection of the plaintiff's counsel, and the witness stating that there was no money paid, or advance made by Beecher on that day, refused to let it be answered; the defendant's counsel excepted to the ruling.

The witness further testified, that on or about the 15th day of July, 1851, his check for \$1,000 was in Mr. Beecher's hands. That William H. Scofield has since sued him on that check; Heslewood's note was paid at maturity, prior to July 15, 1851.

The evidence of the witness as to what occurred on the 9th of April, and as to the check of \$1,000, and as to the payment of the Heslewood check, was all and each part of it objected to by plaintiff's counsel, as irrelevant and not within the issue in the cause.

The witness further stated, that on the 15th July, 1851, he went to Mr. Beecher's with the defendant; he knew no other person as principal, up to that time, but Mr. Beecher.

The witness was shown two papers, which are in the words and figures following :

				S. DAVENPORT.
F. A. Tallmadge,	April 14,	-	-	150
L. Schlosser,	May 14,	-	-	117 50
H. H. Gunter,	July 27,	-	-	819 68
Do.	Aug. 27,	-	-	840 16
Do.	July 20,	-	-	590 16
H. Durbridge,	June 6,	-	-	750
Robt. Hunter,	Aug. 26,	-	-	418 87
				<hr/>
				3,684

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Mch. 28,	500
April 9,	1,000
May 10,	1,300 75
	<hr/>
	2,800 75
May 23,	100
	<hr/>
	2,700 75
	450 00
	<hr/>
	2,250 75

2D PAPER.

Amount of loan July 15, \$2,720 48.

The witness also testified, that on the 15th July, 1851, these papers were made out by Mr. Jones, Mr. Beecher's clerk, in his presence, and delivered to the witness by his direction.

These papers were then offered to be read in evidence to the jury; but, on the objection of the plaintiff's counsel, the court decided they could not be read to the jury; to which ruling the defendant's counsel excepted.

The witness further testified, that the note for \$590 16, mentioned in the above paper, was given to Mr. Beecher on some occasion, but he could not tell on what; it was in another operation.

The defendant's counsel then offered to show, that the two notes mentioned in the papers just offered, as made by the defendant for \$590 16, and \$840 19, respectively, had been paid by the defendant, and presented the notes. This evidence was also, on the objection of the plaintiff's counsel, excluded by the court; to which decision defendant's counsel also excepted.

Other evidence was offered, but which was rejected by the judge.

The learned justice thereupon stated, that the defendant had failed to prove his defence, and directed the jury to find for the plaintiff for the amount of the note and interest. To this statement and direction the defendant's counsel again excepted.

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The jury found, as directed, a verdict for the plaintiff for \$865 09.

Application was now made for a new trial upon the exceptions.

A. Thompson, for the defendant, made and argued the following points—

I. The first paragraph of the answer, denying that the plaintiff was the lawful holder and owner of the note, and defendant's total indebtedness to the plaintiff on said note, was a sufficient answer to let in the defendant's defence of usury. Because, 1. Usury always could be given in evidence under the general issue without special plea. (1 Strange, 498.) 2. New matter in the Code means something arising after the giving of the note, and which avoids the payment. (Code, § 149, 2 Wend. 96; 5 Practice Rep. 14; 6 Prac. Rep. 401.)

II. The answer sets up also that the note had been misapplied; that Beecher had been notified of such misapplication; that his money had been offered to him, which he had refused to receive, and give up the note.

The reply takes issue with the answer, and asserts that the note was regularly transferred in the ordinary course of business, and was taken for full value duly paid therefor, without any usury or illegality whatever; and that the plaintiff is the true and lawful holder of the note in good faith, and entitled to recover in the manner prayed for in the complaint.

III. The complaint and reply both allege an original holding by the plaintiff; and identify the plaintiff with the first transfer of the note; and do not, as claimed on the trial, set up that the plaintiff is entitled to a different defence from Beecher.

IV. If it were necessary to set up the defence of usury, by answer, it was sufficiently set up, and the allegations are to be liberally construed (Code, § 159), and it is sufficient to prove the loan, or forbearance, according to its legal effect. (2 Saunders's Pl. and Ev. 897.)

V. No value was given for this note prior to the 18th March, 1851, when Beecher gave Davenport \$1,500 on his check for

\$1,500; the note in suit \$819 '68, defendant's note for \$736 93, Heslewood's note for \$450, and Schlosser's note for \$117 50, being left as security; and then it first had a legal existence. This transaction was usurious, because,

1. Though no specific agreement was made that day, yet Davenport had made several previous loans for eighteen pence per day on one hundred dollars; and on the 9th of April, 1851, he paid him \$51 88 for the use of \$1,500 from the 18th March, 1851, to that day.

2. This was a direct connexion of this loan with those usurious terms, and proved the usury according to the judge's ruling. (2 Sandford's Rep. 64.)

3. This giving and receiving designedly more than seven per cent. per annum was usury without other proof of the corrupt agreement, than the giving and receiving it, such payment and receipt is *prima facie* evidence of a corrupt agreement. (2 Cowen's Rep. 705.)

VI. The judge erred in deciding that the defendant had failed to prove his defence. Because,

1. No explanation was given, and the proof was full, and the judge was bound, as matter of law, to have charged that the usury was proved. (2 Cowen, 705.)

2. If any claim had been made that the \$51 88 had been received for any other cause, that should have been passed on by the jury. (2 Cowen, 706.)

VII. The judge erred in not allowing testimony as to the agreement between Davenport and Beecher on 9th April, 1851; also the papers made out July 15th, 1851, by Beecher's direction, and Beecher's claiming more money on that day than was due. Because,

1. The securities were altered on 9th April, 1851, and a new check given, and usurious premium paid for the past; and the evidence would have shown directly that the loan of \$1,500 was usurious; and the renewal for \$1,000 was on the same terms; and the statements, written and verbal, made on the 15th July, 1851, if admitted, would have shown the usury also.

VIII. The judge erred also in refusing to receive the testimony offered in the 28th, 29th, and 30th folios of the case. Because,

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1. Each matter thus offered had been set up in the answer, and denied by the reply and the defendant was entitled prove his defence. The issue was not immaterial; the issue was, whether Davenport loaned the face of the notes, or the face of his check. The jury could have found against the usury, and yet given judgment for the money loaned.

2. All the paper was then in Beecher's hands. If the evidence had been admitted, it would have shown only about \$5 70 due on the whole of the paper; and all due 15th July, 1851, was offered to be paid.

IX. The judge erred also in refusing the other testimony offered. Because,

1. Each issue between the parties had been proved for the defendant.

2. The plaintiff alleged the note was regularly transferred to the ordinary course of business. It was proved to have been transferred usuriously and misapplied; and it was offered to be shown that Beecher knew it. The plaintiff claimed nothing more than Beecher's title, nor could he, for he took the note after it was due. (6 Wend. 621.)

3. The plaintiff claimed only on Beecher's title; if he claimed that he was entitled to recover on account of any other person having taken the note in good faith for value, before it was due, he should have shown such person's title; and the defendant was not bound to trace the note from Beecher to the plaintiff. (2 Denio, 609; 4 Denio, 63; 4 Barn. & Cress. 330; 0 Barn. & Cress. 338 and 208; 4 Adol. & Ellis, 338.)

C. P. Kirkland, for plaintiff, contra.

The whole gravamen of the answer is, that this note was an accommodation note, and that one Davenport delivered to W. A. Beecher this note and another note of defendant for \$840 16, and another for \$590 16, and a note of Tallmadge for \$150, of Schlosser for \$117 50, of Durbridge for \$750, and of Hunter for \$418 87; as collateral to loans made by Beecher to Davenport, namely, \$500 on 18th March, 1851, \$1,000 April 9, 1853, and \$1,300 May 16, 1851, and that these loans were usurious.

Unless this contract is proved substantially as laid, the defence

of course fails; and instead of being proved, it is wholly disproved by defendant's testimony.

1. From Crandall's testimony it appears that this note was a business note.

2. The contract between Beecher and Davenport is proved to have been as follows:—

Davenport, on 18th March, 1851, delivered to Beecher, as collateral to a loan of \$1,500, the following notes:—

This note in suit	-	-	-	-	\$819 68
Another note of defendant for	-	-	-	-	\$736 93
Heslewood note	-	-	-	-	\$450 00
Schlosser's	-	-	-	-	\$117 50

And that no agreement was made as to the rate of interest on this loan.

This ends the case, and required the judge to charge as he did, that the defendant had failed in his defence.

II. The defence set up is usury, but the defendant also alleges some payments on the loans alleged in the answer. These loans not being proved, but disproved, it follows that no evidence of payment was admissible. No payment proved or offered was admissible under the pleadings and under the proof showing the loan really made. The defendant did not set up the loan really made, nor any payment on that. The Heslewood note is nowhere stated in the answer.

But this question is not raised in the case; defendant took no exception on this subject.

III. The judge properly excluded the question put. No money was then paid, or advance made or agreed to be: of course there could not, then, have been any agreement for usurious interest. Besides, the defendant had not at all proved the contract of loan set up.

IV. The judge properly excluded the papers offered. 1. The defendant had wholly failed to prove any contract under which these papers could be evidence. 2. They were at most but the declarations of a former holder of the paper. (*Stark v. Boswell*, 6 Hill, 405; *Whitaker v. Brown*, 8 Wend. 490; *Bristol v. Dann*, 12 Wend. 142; *Paige v. Cagwin*, 7 Hill, 361.) 3. They could not be evidence against the plaintiff, till some evidence

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was given to show that Bulkley and Clafflin, of whom he purchased the note, were not *bond fide* holders, or that they received the note after its maturity. (*Nelson v. Cowing*, 6 Hill, 336; *Pratt v. Adams*, 7 Paige, 629; *Pinkerton v. Bailey*, 8 Wend. 600; *Waterman v. Barrett*, 4 Harr. Del. 311; *Jones v. Wescott*, 2 Brevard, 166; 3 Day, 311, per Livingston, J.)

V. The judge properly excluded the evidence as to payment of the notes of \$840 16 and \$590 16, as being wholly irrelevant under the proof in the cause: they had no connexion with the \$1,500 loan. He also correctly excluded the evidence as to the offer made by defendant to Beecher. No offer could be of any materiality. This testimony is also liable to the objections stated under the fourth point. He also, for the same reasons, correctly excluded the evidence as to what Beecher claimed.

VI. Under the pleadings and evidence, the judge could not rule otherwise than he did, namely, that "the defendant had failed in his defence."

DUER, J.—We think that the learned judge who tried this cause rightly instructed the jury to find a verdict for the plaintiff for the full amount that was claimed, since we agree with him in the opinion that the proof wholly failed to sustain the defence set up in the answer. All the material allegations in the complaint were admitted by the answer; and there was, in reality, no question of fact arising upon the pleadings and evidence that could properly have been submitted to the determination of the jury.

It has been contended that the answer sets up two or more defences not inconsistent with each other, and distinct in themselves; but it seems to us quite evident that the only defence which it sets up is that of usury. It is true, that the answer alleges that the defendant received no value for the note in suit, and that it was misapplied by the agent in whose hands it was placed to be negotiated for his benefit; but it contains no averment that either the plaintiff, or Bulkley and Clafflin, from whom he purchased the note, or Beecher, to whom it was first negotiated, had any notice of its fraudulent misapplication, nor was there the slightest evidence to bring home this knowledge to either of them. The plaintiff, indeed, purchased the

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note when it was overdue, and therefore took it subject to any subsisting equity; but no equity, of which the defendant was entitled to avail himself, is either averred, or proved, to have been then attached to it. Hence, the averment that the defendant received no consideration for the note, when he placed it in the hands of Crandall, is not otherwise important than as connected with, and indeed forming a necessary part of, the defence of usury. As to the allegation of a partial payment, it is not distinctly connected even in the answer with the note in controversy; and the proof offered upon the trial related wholly to other notes, and was therefore properly rejected as irrelevant. The whole case, therefore, turns upon the question whether the defence of usury, as set forth in the answer, was established by the evidence upon the trial; or, more properly, was any evidence given in support of this defence which the judge ought to have submitted to the jury; and the necessary answer to this question is, that not only were the allegations in the answer embodying the defence of usury unsustained by proof, but they were, in reality, contradicted and disproved by the very witnesses who were adduced to support them.

The allegations in the answer are, that the note in suit and two other notes made by the defendant,—one for \$840 16, the other for \$590 16,—a note of F. A. Tallmadge for \$150, another of L. Schlosser for \$117 50, another by W. Durbridge for \$750, and another by R. Hunter for \$418 87, were all delivered by Crandall to Davenport, and by him placed in the hands of Beecher, as collateral security for three several loans made to him by Beecher, one of \$500 on the 18th March, 1851, one of \$1,000 on the 9th of April, and the last of \$1,370 75 on or about the 16th May, in the same year; and that each of these loans was made upon an express agreement that Davenport should pay, and Beecher receive, 18½ cents upon each \$100 for each day that the loan or forbearance should continue.

The transaction, as proved by Davenport, was, that on the 18th March he borrowed from Beecher the sum of \$1,500, on the security of the note in suit, of another note made by the defendant for \$716 93, a note of R. Heslewood for \$450, and the Schlosser note for \$117 50, and none other; and that when this loan was made there was no specific agreement whatever

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between him and Beecher as to the rate of interest to be paid.

The answer alleges that there were three loans, founded upon the security of seven different notes, and upon an express agreement for the payment of an usurious rate of interest.

The proof is, that there was but a single loan, not corresponding in amount with either of those stated in the answer, founded upon the security of four notes only, two of which are not mentioned at all in the answer, and accompanied by no agreement whatever as to the rate of interest.

It is needless now to inquire whether other circumstances were not proved by Davenport, from which the jury would have been warranted to infer that the loan made to him was, in fact, usurious, notwithstanding there was no express agreement to that effect at the time of the loan; for even had an express, contemporaneous, and clearly usurious agreement been proved, it would still have been the duty of the judge to have instructed the jury that, from the variance between the usury as alleged, and the usury as proved, the defence had wholly failed, and consequently, that the plaintiff was entitled to their verdict. He could not have instructed them otherwise, without departing from the rule that has uniformly prevailed in courts of law, as well as of equity, that where usury is specially pleaded, the proof upon the trial or hearing must correspond, in all respects, with the allegations in the pleadings, or the defence will be overruled; unless the correspondence is exact and entire, the proof must be wholly rejected. (*Tate v. Wil- ling*, 3 Term R. 538; *Vroom v. Ditmas*, 4 Paige, 526, 533; *New Orleans, G. & B. Co. v. Derby*, 8 Paige, 458; *Rowe v. Phillips*, 2 Sand. Ch. Ca. 14.) The last of the cases cited, *Rowe v. Phillips*, is particularly strong, since the fact of usury was clearly proved, and the only variance between the proof and the allegation was, that the excess, above the legal rate of interest, was somewhat less than the amount specified in the answer.

We certainly have no inclination to depart from the rule which the decisions, to which we have referred, and many others, so clearly establish, nor do we apprehend that the provisions of the Code have released us from the obligation of

following it. We have now, indeed, a large discretion in amending pleadings so as to conform them to the facts of the case, as disclosed by the evidence, and we have, not unfrequently, exercised this power at a General Term, even when no motion to amend had been made upon the trial; but, in our judgment, it would not be a proper exercise, but an abuse of our discretion, so to amend an answer after a trial, as to let in the defence of usury against a holder for value, and without notice, of negotiable paper. It has, however, been insisted, that no amendment of the answer was necessary in the present case, to let in the defence of usury, but that, striking from the answer all the specific allegations which the proof failed to sustain, the defence was admissible under the general denial which the answer contains, that the plaintiff was the lawful holder and owner of the note, and that the defendant was indebted to him thereon in the sum claimed to be due, or in any sum whatever. But these positions appear to us so manifestly groundless, that, had not the defence of usury been specially pleaded, the answer would, in our opinion, have been plainly frivolous, and the plaintiff entitled to an immediate judgment. The answer controverts no material averment in the complaint. It admits the making and transfer of the note, and its possession by the plaintiff, and these are all the facts which the plaintiff was bound to aver, and if denied, to prove, in order to maintain his action. Hence the denial in the answer, that the plaintiff was the lawful owner of the note, and that the defendant was indebted to him thereon, raised no issue of fact whatever, but was a denial merely of a conclusion of law, which, as such, the judge upon the trial, so far from admitting evidence under it, was bound to disregard as irrelevant and nugatory. We are in the constant habit of striking out such a denial as irrelevant or frivolous, and we believe that the same construction has uniformly been given to it by the judges of the Supreme Court. (*Pierson v. Squire*, 1 Code Rep. 91, id. 84; *McMurray v. Gifford*, 5 Howard P. R. 14; *Biddington v. Davis*, 6 Howard, 402.) The Code has given no sanction to the revival in any form of a general issue, under which facts, in their nature constituting a defence, although not averred in the answer, may be given in evidence upon the

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trial; and facts tending to prove that a promissory note, or any other contract, was void in its origin upon the ground of usury, fraud, duress, &c., are, in their nature, just as certainly matter of defence, as facts subsequently arising; and there exists, consequently, the same necessity for averring them specifically in the answer. The system of pleading which the Code has introduced, whatever objections upon other grounds may be made to it, rests upon very sound and obvious principles. The complaint must distinctly aver all these facts which, if denied, the plaintiff must, in the first instance, prove upon the trial, in order to maintain his action. The answer must aver as distinctly all those which, when the case of the plaintiff is admitted or proved, the defendant must prove, in order to defeat a recovery. There are other questions arising upon the evidence in this case, which we have deemed it unnecessary to consider. It may be seriously doubted, whether the note in suit was not a valid business note, in the hands of Crandall, and if not, whether there was any evidence that it was first transferred upon a usurious consideration, that, under any state of the pleadings, could properly have been submitted to the jury; but we decline to express a definite opinion upon these questions, as we prefer to place our decision upon the single ground, that no other defence than that of usury was set up in the answer, and that the allegations in the answer were wholly unsustained by the proof.

The exceptions stated in the case are overruled, and the judgment upon the verdict affirmed with costs.

STEPHEN WHITNEY, Resp'dt, v. JOSEPH MEYERS, Appellant.

The plaintiff demised to defendant by lease, under seal signed by both parties, dated February 8d, 1849, certain premises for one year thereafter, at \$700 per annum, payable quarterly in advance. The action was for the last quarter's rent. The defence was a surrender by operation of law prior to 1st of February, 1850, and also an eviction during the last quarter in March, 1850, by summary proceedings at the instance of the plaintiff.

Held, 1st. That an absolute and unconditional lease by parol during the term, of the whole premises, to a new tenant, occupation and payment of rent by such new

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tenant pursuant thereto, would work a surrender by operation of law. 2d. That a parol lease for less than a year would be valid in law and effectual to vest an estate for the agreed term in the new tenant: that there was no evidence on which to submit to the jury the question of a surrender. 3d. That where rent is payable quarterly in advance, an eviction during the quarter, but after the rent becomes due, does not bar an action for the rent. The most the evicted tenant can equitably claim is a deduction for so much of the quarter as elapses after his eviction.

(Before DUEK, CAMPBELL, and BOSWORTH, J.J.)

October 18, 19; Nov. 20, 1852.

APPEAL from a judgment at special term on a verdict in favor of the plaintiff. The action was brought on a sealed lease executed by both parties, dated February 3d, 1849, by which the plaintiff leased to defendant certain premises for one year from the 1st of May thereafter, at \$700 per annum, payable quarterly in advance, and by which the defendant covenanted to thus pay the rent, and not to assign, let, or underlet the whole premises without the written consent of the plaintiff under the penalty of forfeiture and damages. The complaint alleged the execution of the lease, its terms, and entry under it by defendant, and payment by defendant of the first three quarters' rent, and non-payment of the rent for the last quarter.

The defendant admitted in his answer that he went into possession, and that he had fully paid three quarters of the rent of said premises due and owing by him for the occupation of the premises.

He then averred that before the rent payable February 1st, 1850, fell due, the defendant gave up possession to the plaintiff with his assent.

That on or about the 1st of February, 1850, the plaintiff rented the premises to David and Joel Mandlebaum, or to one of them, and on such letting they or one of them paid the plaintiff the rent agreed upon, and that they or one of them entered into possession as tenants of the plaintiff.

That on or about the 9th of March, 1850, the plaintiff, "under the statute of summary proceedings, obtained judgment against all persons claimed by said plaintiff to be then in possession of said premises, and entered upon and took possession of the same."

The reply put in issue the new matter contained in the answer, except obtaining the judgment by summary proceedings,

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and averred "that the premises were unoccupied when he took possession of the same, as is alleged in the answer."

Judge SANDFORD, before whom the cause was tried, charged the jury that there was no evidence on the part of the defendant to warrant them in finding a surrender of the premises to the plaintiff; that the jury would find for the plaintiff, deducting such sum as was proportioned to the amount of rent from the time plaintiff's new tenant took possession in the spring of 1850, and left to them to find at what time such possession was taken. The defendant excepted to each part of the charge separately, and requested the court to charge that the entry of the plaintiff into the premises before the expiration of the quarter, for the rent of which the suit was brought, was an eviction, and that the plaintiff could not recover any part of the rent for that quarter. He refused to so charge, and the defendant excepted. The jury, under the charge given, found a verdict for the plaintiff for \$131 $\frac{4}{7}$, to the first of April, 1851. This is an appeal by the defendant from the judgment entered on the verdict, and brings up for consideration the correctness of the decisions made at the trial. All other facts essential to a full understanding of the case are stated in the opinion of the court.

Bryan, for appellant, made and argued the following points—

There was sufficient evidence on the part of the defendant, to go to the jury, on the question of a surrender, by operation of law, of the premises for the rent of which this action was brought, before the rent accrued due.

There was evidence on the part of defendant, to show that the witness, Julius Mandlebaum, went into possession of the premises in November, 1849, and was substituted as a tenant therein by mutual consent of plaintiff and defendant.

A good term, from November to May, vested in Mandlebaum.

That the plaintiff collected from the substituted tenant the rent monthly, showing a new agreement, the defendant always having paid quarterly.

That the plaintiff took summary proceedings against the substituted tenant Mandlebaum, to get him out of possession for non-payment of rent.

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The court erred in ruling that there was no evidence of a surrender of the premises, and in directing the jury to find for the plaintiff on that point.

There was a change of possession by mutual consent. (*Stone v. Whitney*, 2 Starkie Rep. 235; *Thomas v. Cook*, 2 Barn. & Alder. 119; *Hamerton v. Stead*, 3 Barn. & Cress. 473; *Whitehead v. Clifford*, 5 Taun. 518; *Grumman v. Legge*, 5 Barn. & Adolph. 324; *Nichols v. Atherton*, London Jurist, vol. ii., part 1, page 778; 2 Barbour, 180.)

The court erred in charging that there was some evidence that the plaintiff entered by his new tenant on the 15th April, 1850. It being admitted by the pleadings, that the plaintiff obtained judgment in ejectment, and entered March 9, 1850; such entry worked at least a discharge of the rent from the time it took place, and was good as a recoupment against the plaintiff's claim. (*Hinsdale v. White*, 6 Hill, 509; *Woodfall*, L. & T.)

As to the effect of not specifically denying a material allegation in answer, see Code, sec. 168.

The court erred in admitting evidence as to the state of repairs of the premises, and the nature of the building; such evidence was immaterial, irrelevant, and applied to no question in issue. No evidence can be admitted, which does not tend to prove or disprove the issue joined. (Russell on Ev. vol. ii., 772; Phillips on Ev. vol. clxi. and Cowen & Hill's notes, vol. ii.; Greenleaf, Starkie.)

The court erred in refusing to charge that the entry of the plaintiff into the premises before the expiration of the quarter for the rent of which the suit was brought, was an eviction.

That the entry on March 9, 1850, was admitted, and that the plaintiff was not entitled to recover rent for that quarter. (*Burn v. Phelps*, 1 Starkie R. 94; 4 Rawle Rep. 339; Taylor L. & T. 183, 285.)

J. Larocque, for respondent, insisted on the following points—

I. The rent being payable, by the agreement, in advance, the whole quarter's rent for that quarter ending May 1, 1850, accrued and became due on the 1st February, 1850, and the plaintiff's right of action was then vested.

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II. There was no valid surrender or acceptance of the premises or of the lease. 1. The evidence distinctly shows that the plaintiff declined to accept the surrender, and made the absolution of Meyers from his liability for the rent, dependent upon its payment by Mandlebaum. 2. If he had verbally agreed to accept Mandlebaum, Meyers's assignee, as his tenant, it would not bind him; the lease expressly requiring such consent to be in writing. (Fol. 26.) 3. There was no evidence of the acceptance of rent from Mandlebaum, otherwise than on account of Meyers; the receipts not having been produced, and the evidence excluded by the court on account of their non-production. (Fol. 36.) 4. The parol surrender would be void under the Statute of Frauds. (2 R. S. 194, Sec. 6, 3d Edit.; 1 Archbishop, 6 East. 86 of York; *Rowan v. Little*, 11 Wend. 616 and 621; *Croswell v. Crain*, 7 Barb. 191; and cases cited.)

III. There was no eviction. 1. The judgment without execution was not an eviction; and if it were, did not divest the right of the plaintiff to the rent which had fallen due on the first of February preceding. (*Hinsdale v. Wight*, 6 Hill, 507.) 2. The entry of Lettman, after the defendant and Mandlebaum had abandoned the possession, was no eviction. The lease to him gave him the right to the possession only from the first of May.

IV. The rulings of the court upon the questions of evidence and the charge to the jury were correct.

BY THE COURT. BOSWORTH, J.—The important question in this case is, did the judge before whom it was tried correctly decide “that no evidence had been given on the part of the defendant, sufficient to go to the jury on the question of a surrender of the lease in question?”

If it was agreed absolutely and unconditionally between the plaintiff, defendant, and Mandlebaum, that plaintiff would accept the latter as his tenant in lieu of the defendant for the residue of the term, and take payment of the rent monthly in advance, instead of quarterly, at the rate of \$700 per annum, and if this agreement was executed by the defendant's yielding possession to Mandlebaum, and by the latter taking possession and paying rent monthly in advance to the plaintiff, and by the plaintiff's accepting it from him as such substituted tenant

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under and pursuant to such agreement, such agreement and acts of the parties under it, would amount to a surrender of the lease by "operation of law." (1 Sand. S. C. R. 5. *Bailey v. Delaplaine*, 1 Law & Eq. R. 374; *Smith & Coles v. Lovell*.)

It is necessary, in order that the new agreement may be effectual to work a surrender by operation of law, that it be valid and sufficient to vest in the new tenant or lessee the estate or term contemplated by the agreement of the parties, and bind him to pay the stipulated rent. (*Schiefflin v. Carpenter*, 15 Wend. 400; *Smith v. Niver & Rockfeller*, 2 Barb. S. C. 180. *Doe ex dem. v. Courtenay*, 11 Ad. & El. N. S. 702; *Doe ex dem. v. Poole*, id. 713.)

A lease to Mandlebaum for six months, the balance of the term, would be valid though made by parol.

In *Doe ex dem. Biddulph v. Poole*—ERLE, J., in delivering the opinion of the court, says, "that an express surrender may be on condition either precedent or subsequent, is clear upon the authorities, as if it be with reservation of rent, and conditioned to be void if the rent be not paid." (Shep. Touchst. 307.) A condition annexed to a surrender, may revest the particular estate, because the surrender is conditional." (Co. Lit. 218 b.)

"This being so as to express surrenders, we can discover no reason why an implied surrender may not also be taken to be conditioned to be void on a given event. As the surrender is by implication only, it is equally open to imply a conditional or absolute surrender; and, where the implication of a conditional surrender prevents injustice and gives effect to the real intention of the parties, the true spirit of the law requires that implication to be made, and forbids an implication leading to the contrary consequences."

Was there such evidence, as made it the duty of the judge presiding at the trial, to have submitted to the jury the question, whether the plaintiff rented the premises to Mandlebaum for the last six months of the term, and whether the latter entered and occupied under such letting and paid rent as such tenant to the plaintiff?

The only evidence, if any, which made it incumbent to submit that question, was given by Mandlebaum, who was ex-

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amined *de bene esse*, through an interpreter. The fact that it was necessary in examining him to have the aid of an interpreter, shows that no great reliance can be placed on his capacity to understand and repeat accurately what was said, when he and the defendant and the plaintiff held the conversation, in which it is claimed the new parol lease was made to the witness. From his testimony it appears that he bought or contracted to buy of Meyers his interest in the unexpired term of the lease before the two went to see the plaintiff on the subject. The lease contained a consent, that the defendant "would not assign, let, or underlet the whole of the said premises, without the written covenant of the party of the first part, under the penalty of forfeiture and damages."

It was therefore necessary to obtain the consent of the plaintiff to the sale made, or contracted to be made, of the lease from the defendant to Mandlebaum. The following questions were put and answers made thereto on his direct examination, viz:—

Q. What took place when you hired the premises of the plaintiff Mr. Whitney? (fol. 35.)

A. He (meaning the witness) bought the place out from Mr. Meyers, and then Mr. Meyers went with me to Mr. Whitney; he, Meyers, asked Whitney if he was satisfied that Meyers should sell the premises out to witness. Mr. Meyers told me I had to pay the rent, fifty-eight dollars and some cents. I paid it, and Mr. Whitney gave me a receipt in my name.

Q. State all that Meyers said to Whitney when you were there to take the premises, and all that Mr. Whitney said. (Objected to as leading.)

A. I went there with Mr. Meyers and my brother, David Mandlebaum, went to the office of Mr. Whitney. Mr. Meyers said there is a man who wants to buy my house out, as I am going to Europe. Mr. Whitney asked him what man I be; Mr. Meyers said, I (witness) would pay the rent. Mr. Whitney said he was satisfied if I'd pay the rent.

Mr. Meyers had the lease in his hand, and told Whitney he had to put my (witness's) name in the lease. Mr. Whitney said it was no use to put his name in it, it was good enough if witness paid the rent to the first of May, and got a receipt in his name. (fol. 39.)

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This is the whole conversation at the time the new parol lease is claimed to have been made, to which the witness testified on his direct examination.

According to this not a word was said about letting the premises to Mandlebaum, but the point of inquiry was, whether Mr. Whitney would consent that the defendant should sell out to him?

The cross and re-examination of the witness do not substantially vary his statement of the actual conversation had between him and the plaintiff and the defendant.

The following questions, and answers thereto, occur in the testimony of the witness, but not in the order here stated:—

Q. How did you engage to pay the rent to Whitney?

A. By the month, and in advance.

Q. Did you so pay it?

A. I did.

Q. Were you to pay the rent in the same manner that Mr. Meyers did—according to the lease?

A. There was nothing said about how I should pay the rent (f. 53).

Q. Where did you first go to see Mr. Whitney about the premises, and when; give the day and month of the year. (f. 46)?

A. Two years ago, in December, 1849, at his office.

Q. In what month did you take possession of the premises (f. 53)?

A. In November, 1849, for the last six months before the first of May, 1850.

Q. How much rent have you paid Whitney in all (f. 71)?

A. Three months—\$175.

Q. Did you pay any rent on the first of February, 1850, for the quarter commencing on that day?

A. I paid only for three months.

It is evident that there is no evidence thus far of a parol demise of the premises by Whitney to Mandlebaum, for six months from Nov. 1, 1849, or for any other period.

The witness testifies that he paid, during three months, rent to Mr. Whitney monthly, in advance, or \$58 33 $\frac{1}{3}$ per month, and took receipts for the rent so paid. Parol evidence of the

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contents of the receipts was excluded by the judge, and we think the decision correct, as the non-production of the receipts was not satisfactorily explained.

Whether the receipts by their terms stated the rent to have been paid by Mandlebaum, as a tenant of Whitney, or on behalf of the defendant, did not therefore appear. The non-production of the receipts would not justify any inference or presumption that their terms were adverse to the plaintiff's claim.

Confessedly, there has been only nine months' rent paid in all, including the three months' rent paid by Mandlebaum.

The complaint avers that "the defendant paid the three quarters' rent, which fell due on the first days of May, August, and November, respectively in said term, but has not paid the quarter's rent falling due the first of February, 1850."

The answer admits that the defendant "has fully paid three quarters of the rent of said premises, due and owing by him to the said plaintiff for the occupation thereof."

This seems to be an express and unqualified admission, that all the rent that has in fact been paid, has been paid by the defendant, and that the occupation to the first of February was his occupation, and that all the moneys paid were due and owing from him for such occupation.

The answer then sets up a surrender of the lease before the accruing of the rent falling due on the first of February, 1850, that the defendant gave up possession of the premises to the plaintiff, and with his assent, but not stating when this was done. It then alleges that on or about the first of February, 1850, the plaintiff let and rented the premises to one David Mandlebaum, to Joel Mandlebaum, or to one of them, and that on such renting they, or one of them, paid him the rent agreed on between them for the use and occupation, and that thereupon they, or one of them, entered into possession of said premises as tenants to the plaintiffs. This answer is signed and verified by Meyers.

If there was any parol demise of the premises to Joel Mandlebaum, it must arise out of conversation had between Meyers and the plaintiff. Mandlebaum, according to his own testimony, was a mere listener at the time of this conversation.

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He does not swear that he said anything himself. As the aid of an interpreter was necessary on his examination, there is no very great presumption that he could have taken any part in making this parol lease, even if he had attempted to do so. Its terms were fixed, if one was made, by the conversation had between Meyers and the plaintiff. His answer, taking it to be true, does not imply that Meyers had much knowledge in relation to it, as he does not undertake to state when it was made, or whether to two or to one, and if to but one, to which one of the two, nor its terms.

We are of opinion that the judge correctly refused to submit the question of a surrender to the jury. The evidence, taken as a whole, in connexion with unequivocal admissions contained in the pleadings, shows that Whitney was asked to consent to a sale by the defendant, of his interest in the premises to Mandlebaum, and that he did consent, and said it would be all right if the rent was paid to the first of May. That as the defendant was going to Europe, he probably intimated that he would not insist on enforcing his right to be paid quarterly in advance, provided it was punctually paid monthly in advance. But he did not agree, and was not asked to agree to resume possession himself, and relet the premises to Mandlebaum.

The old lease was not given up, nor was a request made that it should be. According to Mandlebaum, a request was made that his name should be inserted in the lease. If he is correct in this, it is enough to say that it was not done, and Mr. Whitney declined acceding to the request.

Mr. Whitney, according to this witness, said the lease "was good enough if witness paid the rent to the first of May, and got a receipt in his name." Whatever consent was given or agreement made by the plaintiff, it had this condition annexed to it. There was a failure on the first of February, 1850, to pay either a quarter's or a month's rent in advance. The consent or agreement ceased to be operative, either to relieve the defendant from his liability to pay the quarter's rent falling due that day, or to confer any right on the defendant to occupy the premises thereafter. The testimony, taken together, does not tend to show a demise by the plaintiff to Mandlebaum.

The objection that the plaintiff evicted Mandlebaum by sum-

mary proceedings during the last quarter, and therefore no rent can be recovered for any part of that quarter, is wholly untenable. Proceedings were commenced about the 9th of March, 1850, and, according to the language of the answer, the plaintiff "obtained judgment against all persons claimed by said plaintiff to be then in possession of said premises, and entered upon and took possession of the same."

It is not stated against whom the proceedings were taken, nor whether they were had against persons alleged to be tenants of Whitney, or undertenants of the defendant, whether a warrant was issued to remove the parties proceeded against, nor that any one was in fact dispossessed by virtue of such proceedings. The proceedings themselves were not put in evidence.

Such proceedings operate to cancel and annul the relation of landlord and tenant, between the parties, and the contract or agreement for the use of the premises, from the time of the issuing of the warrant for the removal of the tenant from the demised premises, and not from the time of commencing the proceedings (2 R. S. 515, § 48; 6 Hill, 507; *Hensdale v. White*.)

In this case the rent fell due on the first of February for the whole succeeding quarter. The rent being payable in advance, an eviction before the end of the quarter is no bar to an action for the rent that had previously become due. (*Giles, Receiver, dec. v. Comstock*, 270 of 4 Coms.)

The most that the defendant could claim on any equitable principle, was exemption from rent for so much of the quarter as elapsed after the plaintiff took possession of the premises. The jury were instructed to make such a deduction, and they deducted for the month of April. The charge of the judge on this point was not prejudicial to the defendant, and we are satisfied with the finding of the jury.

A new trial must be denied, and the judgment appealed from affirmed with costs.

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Scamblé, that a contract in writing to sell and deliver coal at a stipulated price, although signed by the vendor alone, is not void under the Statute of Frauds. Such a contract is mutual on its face, the price to be paid for the coal on its delivery being a sufficient consideration for the undertaking of the vendor to deliver it.

Where it is proved that the vendor by any subsequent act recognised the validity of the contract, it is probably binding on both the parties; but whether it is rendered so merely by its delivery to the vendee—*dubitatur*.

When, by the terms of the contract, the vendee was to direct at what places in the city of New York the coal should be delivered; the designation of the places by a notice to the vendor before the time fixed for the delivery of the coal, is a condition precedent to his obligation to make the delivery.

Hence, in an action claiming damages for the non-delivery of the coal, unless it is proved that the requisite notice was given in due time to the vendor, the plaintiff must be nonsuited.

Held, that in the principal case this necessary proof had not been given.

Judgment for defendant, dismissing complaint, with costs, accordingly rendered.

(Before DUEK, CAMPBELL, and BOSWORTH, J.J.)

Oct. 19, 20; Nov. 20, 1852.

THIS action was brought upon a bond given by the defendants on an attachment issued against the property of Jacob Carrigan, of Philadelphia. The plaintiff claimed damages against Carrigan for the non-fulfilment of a contract to deliver coal, and procured an attachment to be issued against his property in New York, to relieve which property from the lien, the defendants gave the bond in question. In their pleas the defendants set up the same matters in defence, which Carrigan might have interposed had he himself been sued upon his contract. The pleadings are voluminous, but their contents need not be stated, as no question in the cause turned upon their construction. The issues made by the pleadings were tried before the chief justice and a jury in May term, 1852; and upon the trial, the contract given in evidence was as follows:—

“I do hereby agree to deliver to J. Selby West, at such places as he shall direct, during the months of August, September, and October next in about equal quantities each month,

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five hundred tons of egg and five hundred tons of good size stove coal, best quality of red ash Peach Orchard, at five dollars per ton, cash, or interest added, after delivery, as he shall prefer. The above coal to be in good order and gross tons. Credit not to be over three months.

“MORRIS BUCKMAN, Agent,
“For JACOB CARRIGAN, Jr.

“New York, April 16, 1846.”

No counterpart was executed by the plaintiff. A brother of the plaintiff testified that at some time during the months of August, September, and October, and he believed in September, though it may have been in October, he heard a conversation between the plaintiff and Morris Buckman, who had acted as agent for Carrigan in making the contract, which conversation had reference to the place where the coal was to be landed, and the plaintiff told Buckman to send the coal to the foot of 28th street. The counsel for the plaintiff also put in evidence the following correspondence between the plaintiff and Carrigan:—

“NEW YORK, Oct. 28th, 1846.

“MR. JACOB CARRIGAN, Jr.,

“DEAR SIR,—Inclosed you have a copy of my contract with you, no part of which has been filled. The time for performance expires on the 31st of this month. As I wish the coal, although it is too late to forward it within the time called for in the contract; still, if you will deliver me the coal forthwith, I will receive it as a fulfilment on your part, otherwise I must hold you responsible. Please to let me hear from you by return of mail, without fail, and let me know what you will do about it.

“J. SELBY WEST.”

“PHILADELPHIA, November 4th, 1846.

“MR. J. SELBY WEST, New York:

“DEAR SIR,—Your note of October 28th is received. As the contract made with you called for you to notify me where the coal was to be landed, I have waited and waited for such

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notice from you, knowing your means were so limited you would not want any of it stored.

"The coal has been ready and waiting such notice from you. I am certainly a little surprised, at this late day, to receive such a note from you. I had come to the conclusion that you did not want the coal. All whom I sell to in the same way notify me regularly how they want it shipped, and at what pier to land it.

"Yours respectfully,

"JACOB CARRIGAN."

The plaintiff then proved that the price of coal in the city of New York was in August, 1846, \$5 10 per ton; in September, \$5 20; and in October, \$5 42; and on the 1st of November, \$5 62. The defendants offered no evidence, but moved for a nonsuit on various grounds. The motion was denied by the judge, reserving the right to afterwards grant a nonsuit, if one ought to have been granted at the trial. The court instructed the jury that the plaintiff was entitled to the difference between the contract price and the market price at the close of the month. To which instruction the defendant excepted.

And the court further charged that the jury might also allow interest on that difference.

To which instruction the defendant's counsel also then and there excepted.

The jury found a verdict for the plaintiff for \$208 33, as damages for not delivering coal, and added thereto the sum of \$23 51 for the costs on issuing the attachment.

The court then directed a verdict for the plaintiff to be entered for \$231 84, subject to the opinion of the court on a case, with liberty to enter a nonsuit.

Either party to be at liberty to turn the case into a bill of exceptions.

H. S. Dodge, in moving that a nonsuit be entered, insisted upon the following points and authorities:

I. The only evidence furnished of the contract alleged is the paper signed by Buckman. It does not appear even that plaintiff assented to it until October, 1846, much less that he ever contract-

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ed to take the coal. The proof, therefore, shows an offer or promise without mutuality, or any consideration in point of fact. (*Chitty Contracts*, p. 15, 16, &c.; *Addison*, do. p. 26, &c.; *Egerton v. Mathews*, 6 East. 307; *Lees v. Whitcomb*, 5 Bing. 34; *Sykes v. Dixon*, 9 Ad. & E. 693; *Utica & Schenectady R. R. Co. v. Brinckerhoff*, 21 Wend. 139.) 2. The word "agree" does not import a consideration. (*Newcomb v. Clark*, 1 Denio, 226; *Bennett v. Pratt*, 4 Id. 275.) 3. Although it may be construed as the promise of both parties, when both sign the same paper. (*Barton v. McLean*, 5 Hill, 256; *Eno v. Woodworth*, 4 Comst. 240;) but not where one party only executes. (*Payne v. Ives*, 3 D. & R. 664; 2 C. M. & R. 51.)

II. The same objection is fatal, if a consideration were proven extrinsically, because the writing does not express it.

1. For although by the statute of frauds, Carrigan might be charged, although the plaintiff had signed no memorandum, yet there must be shown such a contract as would have bound the plaintiff (if he had signed a note of it), and the consideration must appear in the memorandum of Carrigan.

III. The memorandum is not sufficient, because it is not the undertaking of Carrigan, but of Buckman. At least it is equivocal; and parol evidence only can determine the ambiguity, which is inadmissible. (*Moss v. Livingston*, 4 Comst. 208; *Fenly v. Stewart*, 10 Leg. Obs. 49.)

IV. There was no evidence whatever furnished of plaintiff's readiness and willingness to receive the coal, except his offer in the letter of Oct. 28th, when it was too late; and this offer is rather evidence that he was not ready before October. The third, sixth, ninth, and tenth pleas deny this allegation, and plaintiff was bound affirmatively to prove it. (*Topping v. Root*, 5 Cowen, 404; *Coonley v. Anderson*, 1 Hill, 519.) And in this case he could not prove it, without proving also that he gave the notice where to deliver. (*Cook v. Ferraf's Exr.* 3 Wend. 285.)

V. The plaintiff was not entitled to recover, without proof that he had named and directed the piers for delivery as stipulated. The only proof of this allegation (which is denied in the second and eighth pleas) is the evidence of some conversation with Buckman in October. But no proof was offered that Buckman

was agent to deliver the coal or receive notice ; and notice in October was too late.

1. The contract was entire ; Carrigan was not bound to execute such part as plaintiff selected, and plaintiff was bound to give notice before the first of August, as to all the deliveries, so that Carrigan might exercise his right to make delivery, at any time in each month. (*Topping v. Root*, 5 Cowen, 404 ; *Goodwin v. Holbrook*, 4 Wend. 377 ; *Vyse v. Wakefield*, 6 M. & W. 442 ; *Affd.* 7 Id. 126 ; *Rae v. Hacket*, 12 Id. 724 ; *Harrison v. Great Northern Railway Co.*, 8 Law and Eq. R. 469.)

2. As to necessity of notice of an act to be done by the plaintiff, to acquire a right, and the distinction from cases where defendant has to tender in discharge of a duty, vide *Notes to Lent v. Radelford*, 2 Am. L. C. 53, &c. ; *Birks v. Trippet*, 1 Saund. 32 ; *Douglass v. Howland*, 23 Wend. 49.

VI. The court erred in the instructions excepted to. The plaintiff ought to be nonsuited, pursuant to the reservation in the case.

H. Brewster, contra, insisted that the plaintiff was entitled to retain the verdict upon the following grounds :

I. 1. That the paper given in evidence shows a contract. It says, "I agree," (not "I propose") to deliver, &c. 2. The acceptance of the agreement by the plaintiff made it obligatory on both parties. (*Roget v. Merritt*, 2 Caines, 117 ; *Ballard v. Walker*, 3 J. Cas. 65 ; Opinion of Judge Kent.) 3. That a contract was made, not merely proposed, is shown by the letter of Carrigan ; and that such a fact may be proved by letters or other evidence out of the memorandum required by statute, vide *Allen v. Bennett*, 3 Taunt. 169 ; *Saunderson v. Jackson*, 2 Bos. & Pul. 238 ; *Gale v. Nixon*, 6 Cowen 445.

II. The contract was sufficiently executed to conform to the requirements of the Statute of Frauds. 1. The statute does not require the note or memorandum to express the consideration. (2 R. S. 136, § 3.) The statute is similar to that of 1818, and the English statutes. (1 R. L. 79, § 15 ; 29 Ch. 2 O. 3, § 17.) The last statute has not changed the law. (2 Kent. Com. 510, 511 ; note c.) The rule under this statute has been settled by

an unbroken line of decisions. (*Egerton v. Matthews*, 6 East. 407; *Allen v. Bennett*, 3 Taunt. 169; *Western v. Russell*, 3 Ves. & B. 192; *Ballard v. Walker*, 3 Johns. Cas. 60; *Saunders v. Jackson*, 2 Bos. & Pul. 238; *Roget v. Merritt*, 2 Caines, 117; *Russell v. Nicoll*, 3 Wen. 112; *Clason v. Bailey*, 14 Johns. 484; *Davis v. Shields*, 26 Wen. 341.) I also refer to the following elementary works: Story on Cont., Section 783: Long on Sales, 54; 2d Stark. Ev. 356. 2. The contract shows on its face that Carrigan is the contracting party, and Buckman a mere agent. (*Rathburn v. Budlong*, 15 John. 1; *Long v. Colburn*, 11 Mass. 97; *Ballow v. Talbot*, 16 Id. 461; *N. E. Ins. Co. v. De Wolf*, 8 Pick. 56; *Hale v. Woods*, 10 N. H. 470; *Hovey v. Magill*, 2 Conn. 680; *Wilkes v. Back*, 2 East. 142; 2 Wend. 485; 6 Howard P. R. p. 1.) 3. If the terms of the contract were equivocal, the question should have been submitted to the jury.

III. The plaintiff commenced proving that he kept a coal-yard and had plenty of room to, and did store coal, at the time this was to be delivered, and was stopped by the court, and the fourth objection ought not to prejudice the party now. But the plaintiff was not bound to give proof of his readiness because Carrigan was first to perform on his part. The plaintiff had an option of three months' credit, and this court at a general term held that the plaintiff was not bound to exercise this option until the delivery. And also, by the very terms of the agreement, it was cash after delivery, or a credit of three months.

IV. The plaintiff was under no obligation to give notice to Carrigan at what piers he would receive the coal, until Carrigan had the coal ready and requested such information. 1. It was Carrigan's duty to seek the plaintiff and ask his directions. (*La Farge v. Rickert*, 5 Wen. 187; *Lush v. Druse*, 4 Id. 317.) 2. If the notice was required sufficient notice was given. 3. If there was any question as to the notice being in time, the defendants could have gone to the jury on that point. It was not a ground of nonsuit.

V. There is no error in the charge. Carrigan had the whole month of October in which to deliver the coal, and therefore the plaintiff had no right to abandon the contract and get his supplies elsewhere until the end of the month. As to interest,

a jury are at liberty to allow it. (*Dox v. Dey*, 3 Wend. 356.) But as they did not allow interest in this case, the defendants were not prejudiced by this part of the charge.

BY THE COURT. CAMPBELL, J.—The defendants moved for a nonsuit on the trial, and now claim that the same should be granted, because the alleged contract given in evidence was signed only by Carrigan, and did not bind the plaintiff, and was merely an offer to sell; that it was void for want of consideration, and is not a sufficient memorandum within the statute of frauds; that without extrinsic evidence it was not the contract of Carrigan, but of Buckman; that, admitting it to be the contract of Carrigan, the plaintiff could not recover, because he had not shown he was ready and willing to receive the coal and perform on his part before the 28th of October, when it was too late; that the plaintiff was bound to give notice before the 1st day of August of the place where he would receive the coal, and that there was no default until such notice was given;—at all events, that he was bound to give such notice before the 1st of each month as to all the coal to be delivered in that month, and there was no evidence of any such notice.

The objection that the memorandum was insufficient under the statute, we incline to think is not well taken. The contract is not a mere proposal, and is mutual on its face, since the price stipulated to be paid for the coal is a sufficient consideration for the promise to deliver it. Had the memorandum been expressly assented to and signed by the plaintiff, there can be no doubt but he would have been bound, and a contract sufficiently clear, and with an adequate consideration expressed, would have been made out.

It was contended, that the mere receipt by the plaintiff of the agreement, or the acceptance of it by him, was alone sufficient to make it operative and binding upon both parties. This may well be doubted; but, admitting the proposition to be correct, the material and vital question remains to be considered—namely, whether notice ought not to have been given by the plaintiff to Carrigan of the time and place, when and where, he wished the coal to be delivered. As the city of

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New York was the residence of the plaintiff, it is a presumption of law that it was contemplated that the coal was to be delivered in this city; but at what wharves or piers the delivery was to be made could not be known to Carrigan, without notice from the plaintiff, and this notice, by a reasonable construction of his contract, we think he was bound to give. The promise of Carrigan was to deliver the coal at such piers as the plaintiff should direct; and until this direction was given—in other words, until the piers were designated by a previous notice—we do not see how the obligation to deliver could arise or attach. Various reasons might be given tending to show why it might be important to Carrigan to know in advance the precise point to which vessels or barges laden with this coal should be taken on their arrival at this port. But whether the information was, or was not, important to be given, the terms of his agreement required it to be given, and, until it was received, imposed upon him no obligation to act. The only proof relied on to show that the proper notice was given was that of a conversation between plaintiff and Buckman, who had made the contract, and which the witness thinks was in one of the months of August, September, or October, but is not certain as to which. It does not appear that Buckman was Carrigan's agent for the delivery of this coal, and, if he had been, this notice was too late. The contract was to deliver in about equal quantities in each month, and the agreement was signed on the 16th April, three and a half months before any coal was to be delivered. The contract was entire, and a fulfilment of it required the delivery of the thousand tons, in about equal quantities, in each of the months of August, September, and October. The notice required should, at all events, have been given a sufficient time before the month of August, so as to have enabled Carrigan to comply with the delivery of the one third in that month. But as each party was to take the chance of a rise and fall of the market, the plaintiff could not be compelled to take or Carrigan to deliver the whole coal in any one month, nor any part thereof, unless in about equal quantities in each month. On the 28th of October, three days before the time fixed for the last delivery, the plaintiff incloses to Carrigan a copy of the

contract, and demands its fulfilment. It would seem from the letter of Carrigan put in evidence by the plaintiff, that this was the first notice which he had received, and that he had come to the conclusion—and a very reasonable one under the circumstances—that the plaintiff did not want the coal, and had abandoned the contract. It was not necessary for plaintiff to have proved on the trial his readiness and willingness to pay for the coal, because by the very terms of the agreement he had an election of a credit for three months. He proved that he was a coal dealer, and had a coal-yard in the city of New York at the time, and this probably is sufficient evidence of his readiness to receive it, had he given the requisite notice. But it is said that the plaintiff was under no obligation to give notice to Carrigan at what piers he would receive the coal, until Carrigan had the coal ready, and requested such information, and that it was Carrigan's duty to seek the plaintiff and ask his directions. The cases of *La Farge v. Rickert* (5 Wend. 181) and *Lusk v. Druse* (4 Wend. 317) are relied upon. They establish this proposition only—that, when a party has a duty to discharge or an obligation to perform, then he must seek the person to whom the duty or obligation is due, when no place is fixed for its performance, and make a tender. The tenant who has rent to pay, or the obligee in a bond, if no place of payment is named, must seek the landlord or the obligor at his usual residence. There is no analogy between those cases and the present. If Carrigan had wished to charge the plaintiff on the supposition that he, the plaintiff, was bound by the contract to accept the coal, it would have been probably necessary for Carrigan to have sought out the plaintiff, and asked his directions, and to have offered to deliver the coal. But this admission does not at all affect the truth of the proposition, that in order to put Carrigan in default by creating an obligation on his part to deliver the coal, a designation by a previous notice of the places at which the delivery should be made, was indispensable; the giving this notice was a condition precedent, the fulfilment of which the plaintiff was bound to prove. No proof of the fact was given on the trial that in our judgment could properly be submitted to the jury, and consequently the motion for a non-

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suit then made ought to have been granted. According to the reservation in the case, we have power to grant it now, and we accordingly direct that a judgment of nonsuit, with costs to the defendants, be now entered.

**SWEEZY and wife, and WEBSTER and wife, Respondents, v.
THAYER, Public Administrator, Appellant.**

When at the time of the sale of mortgaged premises under a decree of foreclosure, the equity of redemption therein is owned by a minor, and a surplus arises from the sale, his interest therein is deemed real estate, and will be disposed of as such at his death, if he dies under age.

Such surplus will not be converted into personalty, even when it has been invested by the court in personal securities for the benefit of the infant.

When an infant's real estate is converted into money for a particular purpose, the whole surplus, after satisfying such purpose, will be regarded as land.

The law will not allow a conversion thus produced to have the effect of altering his power of disposition over the property, so as to enable him to dispose of it as money, where he could not as land.

The court will so control the proceeds until he becomes of age, that he may take it as money or land, as he may then elect.

If he dies under age it will be subject to the same law of succession, as the property which produced it.

(Before DUER, CAMPBELL, and BOSWORTH, J.J.)

October 20; November 20

This action was brought to recover a fund in the hands of the public administrator, as the administrator, &c., of a deceased infant, Charles W. Willis. The plaintiffs, Mrs. Sweezy and Mrs. Webster, claimed to be entitled to the fund as the next of kin and heirs at law of the infant, but the answer of the defendant denied their title and set up as preferable, that of John Willis, the grandfather of the deceased. The question raised by the pleadings was whether the fund, at the death of the infant, was real or personal estate.

The cause was referred to Murray Hoffman, Esq., who in May term, 1852, made the following special report, accompanying the report with the opinion subjoined:

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In pursuance of the rule of this court in the premises, and upon the application of the defendant, I submit to this court the following special report.

Upon the reference before me, I found from the pleadings and admissions the following facts:

That Joseph O. Bogert, formerly of the city of New York, was seized of certain premises situated therein, and while so seized, mortgaged the same prior to the year 1835, and that such mortgage came by assignment to the mayor, aldermen, and commonalty of the city of New York.

That said Joseph O. Bogert died seized of such premises subject to such mortgage, and that the same descended, upon his death, to his daughter Jane L., afterwards married to John A. Willis.

That the said Jane L. Willis died seized of such premises some time in the month of October, 1842, leaving her husband her surviving, and one child, Charles Henry Willis, an infant under the age of twenty-one years, and that the title to and estate in such premises descended to the said infant, subject to said mortgage.

That John A. Willis, the husband of the said Jane L., departed this life in the year 1845.

That on or about the 1st day of January, 1844, proceedings were instituted for the foreclosure of such mortgage, and a decree of sale having been obtained, the same were sold at some time previous to the 28th of September, 1844, and that after paying the costs and the amount due upon such mortgage, there remained a surplus of \$4,175, which sum was paid into the hands of the assistant register or clerk of the Court of Chancery to abide its order.

That upon an order of reference for that purpose such surplus was reported to belong to the said infant, Charles Henry Willis, and the balance, being forty-one hundred dollars, was invested by order of the Court of Chancery in a bond and mortgage for the benefit of the infant, and the interest thereof paid from time to time to his guardian for his use.

That such infant died on or about the 27th day of November, 1850, in the city of New York, where he then resided, still under age, viz. of the age of eighteen years, unmarried and

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leaving no issue, nor father, mother, brother, or sister, neither a grand-parent on the mother's side.

That such infant left him surviving the plaintiffs, Sarah Sweezy and Josephine O. Webster, the only sisters of his said mother, Jane L. Willis, and his maternal aunts—and also John Willis, his grandfather on the paternal side, who is now living.

That the mortgage hereinbefore mentioned, as given by the said Joseph O. Bogert, was in the usual form with a power of sale, and covenant to render the surplus of a sale, if any, to the mortgagor, his heirs, executors, administrators, or assigns.

And that the defendant, the public administrator, was, on the 29th of April, 1851, appointed administrator of the said Charles Henry Willis, and took possession of the securities in which such surplus money was invested by order of the Court of Chancery, as aforesaid.

Upon which facts my conclusions of law were, that if the fund was at the death of the infant to be regarded as personal estate, it belonged to John Willis, the paternal grandfather, as the next of kin. But that such fund had not, for the purposes of descent and devolution, been converted into personal estate; but was to be considered for such purposes as real estate, and therefore belonged to the plaintiffs, the maternal aunts of the infant.

All which I respectfully submit.

MURRAY HOFFMAN, Referee.

New York, May 3d, 1852.

OPINION OF REFEREE.

I. I cannot entertain the slightest doubt that if the fund in court was, at the death of the infant Charles Henry Willis, personal estate, the grandfather is entitled to it. He undoubtedly is nearest of kin, he is in the second, and the aunts in the third degree. (Kent's Commentaries, vol. ii., page 424. *Bogert v. Furman*, 10 Paige, 500.) The important question then is, What was the nature of the fund in question at the time of the death of the infant?

II. 1st. The great mass of cases connected with this point depend upon the provisions of a deed or will, and upon the solution of the question, whether the testator or grantor meant to impress upon money the character of land, or upon land the character of money.

Thus the great case of *Archroyd v. Smithson* (1 Br. C. R. 506) was determined for the heir-at-law on the principle, that although the testator had directed the fund to be converted, he had done so with an intent to give it to particular persons, and if the shares did not go to these persons, they should not be considered as converted, but that the testator as to them died intestate.

Robinson v. Taylor (2 Br. C. R. 589), another leading case is of the same class. The deviser gave all the residue and remainder of his real and personal estate, after certain legacies, to his executors thereafter named, upon trust, to sell and dispose of his houses and lands for the best price, &c., and out of the moneys arising therefrom, as well as out of the remaining part of his personal estate, to pay certain annuities and certain legacies. The interest of the residue was given for life, and no disposition made of the capital by a residuary devise or otherwise.

All the real estate was sold. The heir-at-law insisted that although the real estate was by will directed to be sold, yet inasmuch as the money arising therefrom was not disposed of, such money should be considered as of the nature of land and as belonging to him, and so it was decreed.

Sir John Leach, in *Smith v. Causton*, (4 Mad. Rep. 484,) took great pains in classing the cases and stating the result.

"Where the deviser directs his real estate to be sold and the produce applied to particular purposes, and those purposes fail partially, the heir-at-law is entitled to that part of the produce which in the events is thus indisposed of. The heir-at-law is entitled to it, because the real estate was land at the deviser's death, and the part of the produce is an interest in that land not effectually devised. Under every will, when the question is whether the devisee, or the heir failing the devisee, takes an interest in land, as land or money, the true inquiry is, whether the deviser has expressed a purpose that in the events which have happened the land shall be converted into money."

Cogan v. Stephens, (Rolls. 24, Nov. 1835. 1 Beavan, 482 N.) Lewis Stephen by his will directed his executors to lay out immediately the sum of £30,000 in the purchase of an estate, the income of which he gave to one for life, with remainder to others in tail, subject to which to go to a charity.

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The money was not paid out, when the limitations prior to that to the charity became exhausted, and the gift of the charity being void under the statute of mortmain, it was held, that the next of kin, and not the heir-at-law of the testator, was entitled to the funds. See the case at length, Lewin on Trustees, p. 366, Appendix.

One other case may be usefully referred to, as it went to the House of Lords. *Cookson v. Reay*, (5 Beavan, 21 Clark and Finelly, 121.) The question was whether a sum of money ought to be considered as real or personal estate. Whether it belonged to the heir or personal representative of Isaac Cookson. And the principle upon which the decision was made is thus stated by Lord Cottenham.

“All the cases established this—That where the conversion has not, in fact, taken place, and the interest vests absolutely, whether in land or money, in one person, any act of his indicating in which character he takes or disposes of it, will determine the succession between his personal and real representatives.”

It is too late at this day to sustain the dictum of Lord Rosslyn, that the court had nothing to do but to dispose of the fund according to its existing nature. It is contrary to the whole doctrine of equitable conversion, and Lord Eldon and a host of cases overthrow it. What the fund ought to be, not what it is, is the question, (7 Hare, 299.)

This class of authorities do undoubtedly furnish a rule by analogy. Yet none of them supply one entirely decisive, because we have nothing to indicate any intention whatever on the part of the creator of the charge and of the power to sell, as to the intent of his will for the change of property.

The mortgage in the present case was in the usual form, the power of sale had the usual clause for the payment of the surplus purchase money, to him, his heirs, executors, or assigns. The creator of the charge thus left the disposition of the surplus to the operation of the law.

2. Again, in the case of *Wright v. Rose*, (2 Sim. and St. 323,) we have the law laid down in case of a sale under a mortgage. A mortgage deed contained a power of sale, and the surplus was to be paid to the mortgagor, his executors or administrators.

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After the mortgagor's death the property was sold under the power, and a considerable surplus remained. The vice-chancellor said, "If the estate had been sold by the mortgagee in the lifetime of the mortgagor, then the surplus money would have been personal estate of the mortgagor. But being unsold the equity of redemption descended to the heir, and he is entitled to the surplus." Recognised in *Cox v. McBurney*, 2 Sand. Sup. C. Rep. 562.

On what does the decision in this case upon both points depend? On a consideration applicable to the case of an adult only.

If the mortgagor submits to a sale, the inference is that he does so because he deems it expedient to convert the land into money.

The case supposed is one of an estate of undoubted value beyond the charge. He does not choose to pay the amount from other funds if he have them, or to raise the amount by a transfer of the mortgage. This reasoning is of course inapplicable to an infant.

So if the heir is an adult, and the land is sold under a mortgage after the mortgagor's death, the heir or devisee is the owner, and virtually elects a conversion of the property into money. He takes the surplus because he is owner, but he takes it in the character of money by his own act or consent.

3. Again, the cases to which I called the attention of counsel, after the argument, have much weight upon the question.

Dixon v. Dawson (2 Sim. and St. 327) was the case of lands vested in trustees to sell, and out of the proceeds to pay her testamentary expenses and a certain class of legacies. Philip Dixon was the heir-at-law of the testator, and the trustees sold the real estate in his lifetime. He died, leaving three children his executors. The oldest was also dead, leaving Sarah, his heir-at-law, and personal representative.

The claim to the surplus proceeds, after discharging the amounts directed to be paid, was between the residuary legatee and the heir-at-law.

It was held, that the residuary clause was not sufficient to carry the surplus, which therefore belonging to Philip Dixon, in

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his life, as he died after the sale and before the trusts of the will were completed, the question was, whether the surplus vested in him as land or money. The vice-chancellor said, "I adhere to the principle which I stated in *Smith v. Causton*, that where the whole land is properly sold by the trustees, and there is only a partial disposition of the produce of the sale, then the surplus belongs to the heirs as money, not as land. The surplus in the present case therefore belongs to the personal representative of Philip Dixon."

I have stated this case particularly, as it was probably the main authority on which the case of *Graham v. Dickinson*, (3 Barb. Ch. Rep. 180,) was determined. The real estate of devisees had been sold by order of the surrogate, upon a deficiency of personal property, for payment of debts. Many years after, a fund arose from the adjustment of the French claims, and was in the hands of the executors. A child of the deviser, one of the devisees, died before the reception of the money, leaving a husband but no children. The question was whether her share went to her husband as administrator, or to her heir-at-law, and it was decreed to the former.

The case went to the Court of Appeals, and was affirmed: no opinion was delivered.

The naked point decided in this case was: that the devisees upon the land being sold, became entitled to a right of recovering out of any personal estate afterwards received, enough to remunerate them.

Their right was one in personal estate, and as such would they have taken it, had it been recovered in their lifetime, as such it would devolve when actually recovered.

An observation here arises of some moment before the revised statutes; there was a right in the heir or devisee of mortgaged premises to have the personal estate applied in discharge of the debt; that right is abolished, and he must pay it out of the land, (2 R. S. 33, 2d ed., § 4, 3d page, 404.) This makes a proceeding of foreclosure against an infant even more marked by *in invitum* than before.

4. Nevertheless, I should feel bound, under all the authorities I have noticed, to hold that the right to the fund must depend upon its nature, as it is found, and go to the next of kin repre-

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sented by the public administrator, but for the circumstance of the heir-at-law being an infant. He was an infant when the equity of redemption descended, when the property was sold; and at his death, a very different and new question is thus raised. I do not understand the case of *Bogert v. Furman*, (10 Paige, 496,) as deciding it. I do not find that any of the owners of the equity were infants at the sale, and the point was not raised.

There are several important cases connected with this point which I shall notice.

Can v. Ellison, (2 Br. Ch. Rep. 56.) By a private act of Parliament, money which had been received as the price of land, sold for the purposes of a division, was ordered to be laid out in the purchase of lands under the direction of the Lord Chancellor. Under the uses declared by the act, a female infant might have elected to take it as money absolutely, but while it continued land, it was subject to a remainder over. By her will she disposed of it both ways, as money and as land. The will was attested to pass real estate, but as land it could not pass from her incompetency to devise, yet it could pass as money. The plaintiff claimed as heir-at-law *ex parte maternâ*. The master of the Rolls, "Money to be laid out in lands must descend as land from generation to generation. The infant was seized of this as of real estate; during her infancy she could not vary the nature of the estate; a petition must be presented to the Lord Chancellor under the act of Parliament."

This was done, and the order declared, that the plaintiff as heir *ex parte maternâ* of the infant E. deceased, was entitled under the act of Parliament to the sum in question, and he electing to take it instead of its being laid out in land, it was paid over to him.

In *Ware v. Pollhill*, (11 Vesey, 278,) Lord Eldon said, "I have uniformly made it a rule where property of one nature has been applied for the benefit of an infant to property of another nature, to have an express provision, that if he shall not attain the age at which he will have a disposable power, the representatives shall not be prejudiced in any way by the act done by the court in contemplation of the infant's benefit. It is said this is the effect of the court's declaration. That is not

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correct, for the declaration is made because that is the law applicable to the case of an infant, and it is of course to reform the order. It does not create the right, but it is a declaration of a pre-existent right to have the property secured."

Webb v. Lord Shaftesbury, (6 Mad. Rep. 100.) Lands vested in trustees in trust out of the surplus rents, to make certain payments, and invest the residue upon mortgage or government securities.

An infant was interested; on an application by the trustees they were permitted to purchase a contiguous real estate, the estate to be conveyed with declaration that the character of personal estate should remain unchanged. The infant at twenty-one might elect to consider it as real estate. It was needless to say in the order that it should remain personal estate till he attained twenty-one. *Weld v. Sew*, (1 Beatty's Ch. Rep. 266,) (Ireland.)

A lunatic was seized by descent of a freehold estate encumbered by a mortgage given by his ancestor. A bill for foreclosure and sale was filed, on petition an order was made that the mortgage debt be paid out of the personal estate of the lunatic not connected with the descended freehold, and the mortgaged premises were conveyed to the committee to be held in trust for the lunatic, her heirs, executors, and assigns.

The lunatic afterwards died unmarried and without issue. The question was between the plaintiffs, as next of kin, and the defendants, as heirs-at-law, as to the amount of the mortgage Lord Manners determined for the heirs-at-law. On a re-hearing Lord Hart reversed his decision and gave it to the next of kin.

He said, "The first and paramount rule to be observed was the comfort of the lunatic; the next not to vary the nature of the property, so as to affect the right of succession, unless it be necessary for the benefit of the lunatic."

He relied on Lord Hardwick's clear authority in the matter of *Hogan* in 1771, where personal estate of a lunatic was applied in payment of a mortgage, and the amount was declared a lien upon the premises in favor of the next of kin.

He then examines the opposite decisions of Lord Northington and Lord Rosslyn in *Guinstone's* case, and shows that they are not law.

The decree declared the next of kin entitled to have the

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amount paid to discharge the mortgage a lien on the real estate, and that it be raised accordingly.

Although the rules as to lunatics are stated to have been originally derived from the Statute 17 Ed. II., yet I consider that in our state the question both in lunacy and infancy will rest upon the same principles.

This well considered case then settles, that if a lunatic's (and the reasoning is the same as to infants) personal property is applied to discharge an ancestor's mortgage, the amount is considered a lien on the estate thus relieved, and the next of kin has the benefit of such lien upon the lunatic's death. It does not descend, as it is found.

It would be impossible, I think, to resist the converse conclusion that, if through the intervention of a Court of Equity, land descended upon a lunatic or infant is sold and a surplus beyond what is requisite for the purposes of the sale, remains at his death, the primary character is unchanged, as respects a devolution.

If it is said that in such cases the preservation of the property in its original nature is effected by force of the orders of the court, the answer of Lord Eldon is decisive: "The declaration (in the order) is made because that is the law applicable to the case of an infant. It does not create the right, but is a declaration of a pre-existing right to have the property so secured."

The Legislature, in the statute respecting the sale of infant's estates, has embodied this principle. I look upon it as a cautious declaration of the law, not as the establishment of a new principle (2 R. S. 268, § 180). See Reviser's notes as to effect of the clause omitted by the Legislature.

The case of *Gillespie v. Foy*, (1 Iredell's Eq. Rep. 281,) in North Carolina, was very similar to the present, but it was decided under the provisions of their statute (1 R. S. 314, § 27).

The land descended to the infant children from their father; and one dying, the whole vested in the survivor. A sale was made under the direction of a court for the benefit of the infant, under a statute similar to our own. The funds were in the hands of the guardian, and upon the infant's death were decreed to his paternal aunt, who would have taken the land had it remained unsold.

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5th. There remains the question whether the sale in the present case was so far made under the authority of the Court of Chancery as to justify the application of that rule as to conversion, which Lord Eldon declared to be a settled rule of the court.

The mortgagee had the right, under his power of sale, to resort to an advertisement and sale under the statute. He preferred resorting to a Court of Chancery, and filed his bill.

I have heretofore supposed, that the power of our court to make a sale had grown up as part of its colonial jurisdiction, sanctioned by statutes, and was independent of the power of sale in the mortgage, and was not derived from the power of the English courts. (See 2 Hoffman's Ch. Pr. 95, Note 2.)

In exercising the power of decreeing a sale, where infants are concerned, the court carefully inquires beforehand, whether a sale of the whole is necessary; if not absolutely necessary, then whether it would be most beneficial for the infant that the whole should be sold or part only, and what part, to raise the amount due. The mortgagee can call for nothing but a sale of enough of the property to pay his demand. The sale of any portion of the property beyond that is the act of the court founded upon the conclusion that it is for the infant's benefit.

We find therefore a conversion, by authority of a Court of Chancery, of land into money, purely and solely because the interests of the infant require it.

It seems to me the case is brought within the principle of the cases I have cited, and that the act of the court ought not to work a change in the character of the surplus, but that during the infant's life it should retain its original nature, as land.

With much diffidence upon a question, in many respects new and grave, I have come to the conclusion that the heirs-at-law of the infant are entitled to the fund.

MURRAY HOFFMAN, *Referee*.

The general report of the referee was as follows:—

In pursuance of an order of this court, dated the 26th day of February, 1852, I, the subscriber, the referee named therein, having heard the parties to this action, do report, determine,

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and adjudge, that the costs of both parties, with a reasonable counsel fee to each, and the fees of the referee, be paid out of the funds in the hands of the said defendant, and which is the subject matter of this action, and that the residue of such fund be paid over to the plaintiffs in this suit as belonging to them, that is to say, one half part thereof to Calvin Sweezy, and Sarah his wife, on their joint receipt and discharge, and the other half part to Daniel A. Webster and Josephine O. his wife, on their joint receipt and discharge.

MURRAY HOFFMAN, Referee.

New York, April 15th, 1852.

At the special term in May this report was affirmed, and judgment entered thereon. The defendant appealed from this judgment, and the appeal was now heard.

S. A. Crapo, for the defendant, the appellant, relied upon the following points and authorities, which he discussed at large.

I. By the foreclosure of the mortgage, the title of Charles A. Willis was extinguished, and the whole premises were converted into personal property, to be applied by the court, *first* to the payment of the mortgage debt, and afterwards according to the rights of other parties. The right of the intestate Charles A. Willis to the surplus, was one to personal property, and he being dead, the defendant as his administrator is entitled thereto for the benefit of creditors and next of kin. (*Bogert v. Furman*, 10 Paige, 496; *Wright v. Rose*, 2 Sim. and Stuart, 323; *Graham v. Dickinson*, 3 Barbour Ch. 173; 3 P. Wms. 341; 3 Bac. Ab. 58; *Blackborough v. Davis*, 1 P. Wms. 41; *Woodruff v. Nickworth*, Prec. in Ch. 527; *Mentuary v. Pelty*, id. 596.)

II. The conversion of the realty into personalty, in this case, was effected by the Court of Chancery in the legitimate exercise of its jurisdiction, and in pursuance of a contract made by the ancestor of the intestate. The sale therefore was a legal and statutory conversion of realty into personalty.

III. The interest of the intestate in the mortgaged premises was subject to the contract made by the ancestor that the whole

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estate should be converted into money, if it should become necessary for the payment of the mortgage debt. It having been so converted, the right of the intestate to the surplus was one to personal property.

IV. The same principle must prevail where the conversion of land into money is made by contract *inter vivos*, as in cases of testamentary powers; namely, "when the purpose of the testator requires the sale of the whole land, and there is only a partial disposition of the produce, the surplus belongs to the heir as money and not land, and will go to his personal representative." (1 Williams on Executors, 456, and cases there cited.)

V. In this case the mortgage was upon a single lot of land, and the payment of the mortgage debt required the sale of the whole land.

VI. The sale in this case having been made by authority of the Court of Chancery, in pursuance of a contract made by the ancestor of the intestate, and in order to enforce the payment of a mortgage debt, the cases cited by the referee of applications made on behalf of lunatics and infants to change the condition of their property from realty into personalty, &c., have no applicability.

VII. The intestate, Charles Henry Willis, having died unmarried, without leaving descendants, father, mother, or sister, his paternal grandfather, John Willis, is, by the rule of the civil law, which must govern in this case, the sole surviving next of kin, and is entitled to the estate.

See the decision of the Surrogate on the application for letters of administration in this case. (*Sweezy v. Willis*, 1 Bradford (Surrogate) R. 495; *Bogert v. Furman*, 10 Paige, 500; 2 Kent. Comm. 424; 2 Bl. Comm. 32.)

G. Clarke, for the plaintiffs, made and argued the following points:

I. Under the circumstances of this case, the property in question must be considered as real estate,—and having come to the intestate on the part of his mother, must descend to the two sisters of the mother according to the statute of descents.

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(1 R. S. 751, old ed. § 12.) 1. The real estate—of which the fund in question is part of the proceeds—descended to the intestate from his mother; and had it remained in fact real estate, must have descended to the two sisters of the mother as his heirs-at-law. 2. The intestate, being an infant, could not have alienated it; and even if it had been sold, pursuant to the “Statute for the Sale of the Real Estate of Infants for their Benefit,” the proceeds would not have lost the descendible quality of real estate, but would have gone to the same persons as the estate itself. (2 R. S. old ed. 195, § 180.) 3. If the proceeds of the real estate of an infant sold for his benefit, and by proceedings instituted in his behalf, retain the same devolutionary quality which the estate itself had,—*a fortiori* will the surplus proceeds retain the same character when the estate is sold by proceedings *in invitum*?

II. The conversion in this case was made by a Court of Equity, which had no power to decree a sale of any more of the mortgaged premises than was sufficient to pay the mortgage debt, and consequently no power to change the quality or character of what remained; and if more was sold *ex necessitate*, the surplus not wanted for the purpose of sale was a resulting trust in favor of the infant intestate—who was incapable of making an election, and the Court of Chancery consequently held such surplus as a resulting trust until his death—and then it went to his heirs-at-law, in like manner as if it had actually remained real estate. (5 Whart. R. 60, *in re Tighlman*; 2 Dev. and Battell, E. R. 144, *Scull v. Penigen*; 2 Yeates R. 261, *Diller v. Young*; 3 Wheaton, 582, *Craig v. Leslie*; 4 Maddox R. 491, 492, *Smith v. Caxton*; 1 Brown, C. R. 504, *Akroyd v. Smithson*; 11 Ves. 278, *Ware v. Polhill*; 1 Ves. and B. 173, *Hill v. Wood*; 8 Ves. 235, *Wheldale v. Partridge*; 2 Ves. 12; 4 Ves. 149; 1 Whart. 162; Adams’s Doctrine of Equity, 136, 138, 139, 285–297.)

III. The infant intestate was seized of land,—he could not vary the nature of the estate during his infancy. If it had been sold for his benefit pursuant to the statute, it would still retain the character of real estate (2 R. S. 268, § 180); and if sold by proceedings *in invitum*, such proceedings would not change the character of any more of the infant’s estate than was neces-

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sary for the legitimate purposes of the sale,—the surplus must retain its original character. (See the cases above cited. Also 2 Br. C. R. 56, *Can v. Ellison*; 11 Ves. 278, *Wase v. Polhill*; 1 Beatty, Ch. R. 266, *Well v. Sew*; 1 P. Will. 389, *Seely v. Jago*. See also the cases cited in referee's opinion.)

IV. The report of the referee is correct; is sustained by long established authority; and the judgment entered thereon should be affirmed.

Nov. 20. BOSWORTH, J., now delivered the judgment of the Court, and after stating the facts, proceeded as follows:

Murray Hoffman, Esq., the referee to whom the action was referred, decided, on these facts, that the securities in which the surplus was invested must be regarded as real estate for the purposes of descent and devolution, and, therefore, belonged to the plaintiffs, his maternal aunts. A judgment was entered on the report directing the moneys in the defendant's hands to be paid to the plaintiffs. The defendant appeals from the judgment, and the question presented on the appeal is, were these securities, on the death of Charles Henry Willis, to be regarded as real, or, as between his heirs and next of kin, as personal estate?

On the part of the plaintiffs it is contended that the fund, being the proceeds of real estate belonging to an infant, will be treated as land, until some one entitled to it, and of legal capacity, shall elect to take it as money.

That the court had no power to decree a sale, for the purposes of conversion, of more of the land than was sufficient to pay the mortgage debt, and costs of the suit; and that having sold the whole, as a matter of necessity, the premises being a single lot, the character of the surplus was not and could not be changed into personalty by the court, but that it was held by the court as a resulting trust until his death, on which event it descended to his heirs-at-law, as if it had actually remained real estate.

On the other hand, the defendant insists that the realty having been actually converted into money in the life-time of Charles Henry Willis, by a court of competent authority in the legitimate exercise of its powers, and in pursuance of a contract made by the ancestor of the estate, and subject to which it

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had descended to the latter, the surplus, at the time it arose, and the right of Charles Henry Willis to it was determined, belonged to him as the owner of the land which had produced it, but that it belonged to him as money and not as land. That the claims made to it, by his heirs and next of kin, must be determined by the actual character of the property as it existed at his death, and not by the character of the property which had produced it. That, having been lawfully converted into personal property in his lifetime, and being actually such at the time of his death, it must be distributed as personal property, and therefore belongs to John Willis, the paternal grandfather, who was the next of kin.

The argument in support of the plaintiff's proposition is based partly on the principle established by a long series of decisions in cases arising under wills, by which it is settled that land devised to be sold and turned into money, is treated as money, and money bequeathed to be invested in land, is treated as land, and will descend as such, until some one entitled to it in his own right and capable of electing, has manifested an intention to receive it in the form and character in which it actually exists. Courts of equity treat such property for most purposes precisely as if the directions contained in the will, or the terms of an ancestor's contract respecting the property, if the rights of parties depend on such a contract, had been specifically executed.

They regard the substance, and not the forms of agreements and other instruments, and will give them the precise effect which the parties intended, and in furtherance of, and for the purpose of executing such intention.

When a Court of Equity is required to determine between persons claiming such property by the right of succession, it treats it as property impressed by the will or act of the party who is the ultimate source of title, with a specific character different from that in which it is found, and disposes of it as continuing to possess that character, until some one entitled to the whole beneficial interest has elected to take it in the form in which it is found, or has received it under a performance of the contract, or in execution of the provisions of the will by which the original right to it was created,

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Crag v. Leslie, 3 Wheat. 563; 2 Story's Equity, §§ 790, 791, 792, and 793, and cases there cited; Law Library, vol. xlix. p. 560, &c.; *Stagg, Executor, &c., v. Jackson and Wife*, 1 Coma. 206; 7 Hare, 299; *Griffith v. Rickets*; *Same v. Lunell*.

It is evident, from these cases, that a Court of Equity will not divest property of the character in which it finds it, or which it finds impressed upon it, except at the instance of some party having the right to invoke its interposition for such a purpose. The only party who can ask to have this done must be one entitled to the whole beneficial interest in the property, and who has a right to convert it himself from one form to another, and who is of legal capacity to make an election.

It is the constant rule of Courts of Equity to hold lands purchased by the guardian with the infant's personal estate or with the rents and profits of his real estate, to be personal and distributable as such; and, on the other hand, to treat real property, turned into money, as still for the same purpose real estate. And when the court directs any change of property, it directs the new investment to be made in trust for the benefit of those who would be entitled to it, if it had remained in its original state.

2 Story's Eq., § 1357.

In *Ware v. Polhill* (11 Vesey, 278), Lord Eldon said that such a declaration is made because that is the law applicable to the case of an infant. The declaration in the order or decree "does not create the right, but it is a declaration of a pre-existent right to have the property secured."

In *ex-parte Phillips* (19 Ves. 122, 123), Lord Eldon said:—"In the case of the infant, it is settled that as a trustee out of court cannot change the nature of the property, so the court, which is only a trustee, must act as the trustee out of court; and finding that a change will be for the benefit of the infant, must so deal with it as not to affect the powers of the infant over his property even during his infancy, when he has powers over one species of property and not over the other. It may be for the benefit of an infant, in many cases, that money should be laid out in land, if he should live to become adult; but if not, it is a great prejudice to him, taking away his dominion, by the power of disposition he has over personal property, so long

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before he has it over real estate. The court, therefore, with reference to his situation, even during infancy, as to his powers over property, works the change, not to all intents and purposes, but with this qualification, that, if he lives, he may take it as real estate, but without prejudice to his right over it, during infancy, as personal property."

If this surplus was personal estate for all purposes, from the moment of the sale, the infant might have disposed of it by a will in writing at any time after he became eighteen years of age (2 R. S. 60, § 21). He had attained that age before he died.

If it is to be treated as real estate, he could not devise it until after he attained the age of twenty-one years (2 R. S. 57, § 1).

Hence, it is obvious that section 180 of the statute entitled "of proceedings in relation to the conveyance of lands by infants, and the sale and disposition of their estates," was merely declaratory of what was deemed to be a well settled principle of equity jurisprudence. That section declares that no sale made pursuant to that act, "of the real estate of any infant, shall give to such infant any greater or other interest or estate in the proceeds of such sale than he had in the estate so sold, but the said proceeds shall be deemed real estate of the same nature as the property sold."

In this case the infant's property was not sold under this act. It was sold as a matter of necessity, as the mortgaged property was a single lot. It was real estate of the infant when the law, through the interposition of the Court of Chancery, began to operate upon it. It was no part of the object or purpose of the foreclosure suit to affect the estate of the infant or the nature of his property, or his power of disposition over it during his infancy. The sole purpose and object were to sell enough to pay the mortgage debt and costs of the suit. If enough and no more could have been sold separately, to satisfy that object, without any prejudice to the owners of the equity of redemption, only so much would have been sold, and the residue, which would have belonged solely to the infant on the death of his father, would have been real estate in which he would have had an absolute estate in fee simple. But having regard to his interests it became necessary to sell the whole premises. Having sold the whole, the court which ordered the sale will

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hold so much of the surplus as represents the infant's interest and estate, as real estate until he becomes of age, or will dispose of it as such if he dies before that event happens.

In *Moris et al. v. Murgatroyd et al.* (1 J. Ch. R. 119-130), Chancellor Kent held, in a case of a surplus arising from a sale of mortgaged premises, which took place after the death of the mortgagor intestate, and while some of his heirs were infants, that the surplus was part of the real estate, would go to their heirs, and would be assets in their hands. And although the court applied the surplus to pay debts of the mortgagor on account of his personal estate being insufficient for the purpose, it refused to allow his administrator to distribute it as personal estate, in which event it would have been absorbed, as the law then was, in paying a judgment which had been confessed by the administrator, but treated the surplus as equitable assets, and distributed them as such ratably among all the creditors.

The case of *Lloyd v. Hart, Admin. &c. of Evans* (2 Barr, 473), is a recent one, and was fully considered. If correctly decided, the principle involved in the decision is conclusive as to the rights of the parties in this case. A sale of the real estate of a lunatic was ordered for the purpose of paying his debts, and was made by his committee pursuant to an order of court, and there was a surplus of over \$3,000.

After his death there was a contest between his heirs and next of kin in relation to the surplus, and each claimed it. The court below held that it was to be treated as personalty, and that it belonged to the next of kin. It rested its decision on the principle contended for by the defendant in this case; that the conversion had been made by order of a court of competent authority, and, therefore, could not be taken to be a wrongful conversion; that the heir had no such equity as would induce the court to inquire into the origin of the fund; that the parties claiming it must take it as they found it at the time of the death of the intestate.

The act of the Legislature which authorized the sale was silent as to the consequences of a conversion, and made no provision whether the surplus, if any arose, should be deemed personal or real estate.

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A writ of error was brought, and the judgment below reversed. The court, after adverting to the leading cases of conversions directed by wills, said that, "from these it appears that the equitable character of the property when legally converted, depends on the will of the deviser collected from the purpose to be answered by it; but the committee had, in this instance, no will to exercise or power to convert, as a deviser has, from motives of mere caprice, or for any *motive* not authorized by *statute*. The sale was for the maintenance of the lunatic and payment of his debts. Consequently what remained when that was accomplished, retained the impress of real estate."

(See 2d Yeates R. 261; *Deller v. Young in re Tilghman*, 5; Wharton, 64; *Scull v. Janegan*, 2; 2 Dev. and Bat. Eq. R. 144.)

March v. Berrier (6 Iredell's Eq. R. 524) was decided by the Supreme Court of N. C. in 1850. It related to a surplus produced by the sale of land which had descended to an infant. The sale was made under the decree of a Court of Equity, to create funds to pay debts owing by one Wilson, the intestate, who died seized of the lands. The sale was made in the lifetime of the infant, and a surplus of \$639 64 was actually paid by the clerk and master, who made the sale, to the guardian of the infant. The infant afterwards died under age and unmarried. A bill was filed by her heirs at law to procure a decree that this surplus be deemed land and be paid to them, and a decree to that effect was made.

The court in its opinion said that, "when a Court of Equity orders a sale of the real estate of an infant, in order to raise money for a particular purpose, it would not, upon its own principles and independent of any provision by statute, allow its decree to affect the rights of succession to a surplus remaining after answering that purpose. The money stands for the land of which it was the proceeds."

That the fact that the surplus had been paid to the infant's guardian made no difference. The acts of that person, or the dealings between him and the infant's administrator, could not change the equitable nature of the fund so as to disturb the rights of the heirs at law. The court decided that the interest which had accrued during the infant's life-time was personalty,

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but that the capital and interest that accrued thereon subsequent to her death belonged to the heirs at law.

The purpose of the sale, in the present case, was to satisfy the mortgage debt and the costs of the foreclosure suit. Except as a matter of necessity, the court would not have converted into personalty more of the premises than was sufficient to answer that purpose. That purpose was fully answered by the application of a part of the proceeds.

The principles upon which the court acts, and by which it is governed, will not allow it to regard the surplus as property of a different nature from that which produced it. If land has been converted, it will treat the proceeds as land, until the infant is capable of electing and actually elects to take it as money.

If a different rule obtained, the infant, in this case, as he lived until he attained the age of eighteen years, might have bequeathed it as money. If it had not been converted, he could not have devised it until after he was of full age. So, on the other hand, if his money is ordered to be invested in real estate and is so invested, the court will treat the land as money. On any other principle the act of the court would deprive him of a right, created by statute law, to bequeath his personalty on attaining the age of eighteen years. I am inclined to think that the true ground of the rule is the one stated by Lord Eldon in *ex-parte* Phillips, and that it is not based upon any supposed equity of the next of kin to succeed to the personal and of the heirs to take the real estate, and to have it retain the character it possessed when the infant's title accrued, until his death, or until he becomes of age.

But whatever may be the true reason of the rule, Courts of Equity seem to have acted uniformly upon the principle that, in converting the real estate of an infant for a particular purpose, they had no power to convert, to all intents and purposes, any more than was required to answer such purpose. And that if incidentally it necessarily happened that more was converted, it was their duty to treat the excess or surplus as property of the same nature as that converted, and to dispose of it accordingly among those claiming by the rights of succession.

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We regard this principle to be well settled, and that § 186 of 2 R. S. 195, is but a legislative declaration of this principle. That it must be applied and enforced in all cases of a surplus arising from a sale of his lands under the decree of a court, as well as where a sale is made for either of the purposes specified in that act.

The only case cited apparently in conflict with the rule and the decisions referred to, is that of *Bogart v. Freeman*, 10 Paige 492. That was a contest in relation to a surplus arising from a sale under a decree of foreclosure. The report of the case states that "E. Freeman, the elder, widow of the mortgagor (who died before the sale), was grantee in fee of the mortgaged premises," when the decree was entered. "But in fact she was only entitled to dower in the equity of redemption. She held the residue in trust," one eighth thereof for each of her seven children, and one sixteenth for each of two grandchildren. After her death there was a litigation respecting the surplus. The Chancellor, assuming that certain of the children and grandchildren, who were dead, had died infants, decreed that their shares of the surplus must be deemed personal and not real estate, and that they belonged to their next of kin.

No authority is cited in support of the proposition. It does not appear from the report what was the nature of the trust, nor whether the instrument by which it was created did not direct the land to be sold after her death, and the proceeds divided as money between the children and grandchildren. If such was the fact, the decision was in harmony with the well settled rules relating to equitable conversion. There is nothing in the facts stated which makes it necessarily conflict with the authorities cited.

In *Graham v. Dickinson* (3 Barb. Ch. 169), real estate devised was sold after the death of the testator to supply a deficiency in his personal estate. One seventh of the land so sold belonged to the complainant's wife as such devisee. Sufficient of the proceeds was applied to pay the debts, and the residue was paid over to the devisees. Hence the whole proceeds were actually disposed of. Complainant's wife subsequently died without having had any issue, and he was appointed administrator of her estate.

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Subsequently to her death, the executors of her father's estate realized a large sum of money from a claim of the estate against the French Government, and the complainant filed a bill, as administrator of his wife, to recover one seventh of this fund, as a substitute for part of her real estate which had been sold to pay debts primarily chargeable upon the testator's personal estate.

The executors resisted the claim on the ground that the fund was to be considered real estate at the time of the death of complainant's wife, and that it belonged to her heirs at law, and not to her personal representatives. The chancellor decided that the fund must be treated as personalty, and that it belonged to the plaintiff as administrator.

The report of the case states expressly that it did not appear by the pleadings or proofs in the cause whether the marriage of complainant took place before or after the sale of the real estate of his wife. Neither does it appear that she was then under age. If of full age and a feme sole, and nothing to the contrary appears, then the decision is in harmony with all the cases which hold that where real estate is converted by operation of law, in the lifetime of an adult owner, the surplus, if there be any, will be treated as money, and at his death will be distributed as such. (*Banks et al. v. Scott*, 5 Mad. 500; *Dixon v. Dawson*, 2 Sim. and Stew. 327, 329; *Flanagan v. Flanagan*, Law Lib. p. 578; and what Lord Eldon, in his argument in *Ackroyd v. Smithson*, says of the grounds on which the former was decided.)

Graham v. Dickinson (p. 184) is in conflict with all the authorities, if it is to be deemed a decision that the rule which it asserts applies to a surplus arising from the sale of an infant's real estate. As the report of the case does not state that the heir was either an infant or married at the time of the sale, and as no authorities were cited applicable to a surplus arising from the sale of an infant's land, it cannot be said to decide a question that does not appear to have arisen or been discussed.

We are of the opinion that there is nothing decided in either of those cases at variance with the rule uniformly acted upon by courts of equity,—that a surplus arising under such circumstances as this must be treated as land, until the infant to whom

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it belongs has reached an age at which he is capable of taking it as money, and has elected so to take it. Up to the time of his death, he was in law incapable of making an election. It must, therefore, be regarded and disposed of as it would have been if it were in fact land. We concur in the opinion that the referee decided the law correctly. The judgment appealed from must be affirmed.

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The answer of the defendant, who was sued as the maker of a promissory note, set up as a defence, that the note in suit had been delivered to B for a renewal of a former note of the defendant, for the same amount, of which B was then the holder and owner. And that B, after such delivery, instead of returning the first note, kept them both, and therefore averred that no consideration had been given for the note in suit.

Held, that these facts constituted no defence to the present suit, since they were evidence that the first note, which, for aught that was alleged, was still in B's hands, had been satisfied, and could not therefore be enforced against the defendant. The answer therefore, in effect, proved that the note in suit was founded on a valid consideration.

Held, also, that the motion of the plaintiff, on the trial, to exclude the defence, as irrelevant, ought to have been granted.

The evidence which the defendant was permitted to give on the trial tended to prove that B, before the note in suit was delivered to him, had parted with the first note to a holder for value, and that his transfer to the plaintiff of the note in suit was, therefore, a fraudulent misapplication.

Held, that as this defence was different in its entire scope and meaning from that set up in the answer, the evidence ought not to have been received.

Held, also, for the same reason, that the answer, under the provisions of the Code, could not be so amended as to let in the defence.

When a defendant, sued as the maker or endorser of a negotiable note or bill, proves upon the trial that it was obtained from him by fraud, or was fraudulently put in circulation, the plaintiff is bound to prove that he gave value for it when he received it.

When a valuable consideration, however, is proven, the burden of proof is again shifted, and that of showing that the plaintiff had notice of the fraud is cast upon the defendant.

A witness who, for a valid consideration, has agreed to indemnify the defendant by whom he is called, is incompetent under the Code "as a person for whose immediate benefit the action is defended." (Per BOSWORTH and DUNE, J.J.)

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A consistent interpretation must be given to the two sections in the Code (§§ 348, 349), that which declares that "no witness shall be excluded by reason of his interest in the event of the suit," and that which excepts from the application of the rule those who are "parties to the action, or for whose immediate benefit it is prosecuted or defended." (Duer, J.)

Semble—that these provisions can only be reconciled by confining the exceptions from the general rule to those who, in judgment of law, are parties to the suit; that is, as parties on the record, or parties in interest. (Duer, J.)

Those only, as parties in interest, are parties to the suit, who, in all respects and for all purposes, will be concluded by the judgment to be rendered. (Duer, J.)

New trial granted, costs to abide event.

(Before Duer, Campbell, and Bosworth, J.J.)

Oct. 18 ; Nov. 20, 1852.

THIS was an action against the defendant as the maker and endorser of a promissory note, and was tried before the chief justice in March, 1852. A motion to set aside the verdict and for a new trial was afterwards made upon a case at a special term, and was denied, and the cause was now heard upon an appeal from this decision.

In order that the questions raised upon the trial, and upon the argument, may be properly understood, it will be necessary to state *in extenso*, both the pleadings and the evidence.

The pleadings, omitting the reply, which merely took issue upon the allegations of new matter in the answer, are as follows :—

The complaint of the above named plaintiff respectfully shows to this court, that the defendant heretofore at said city of New York, made his promissory note in writing, bearing date the fourth day of June, one thousand eight hundred and fifty-one, whereby he promised to pay, three months after the said date of said note, to the order of himself the said defendant, for value received, the sum of three hundred and twenty-six dollars, and the said defendant did thereupon duly endorse the said note, and transfer the same so endorsed, so that the same, before the maturity thereof, came to the possession of, and was owned by the plaintiff. And although the said note became due and payable before the commencement of this action, yet the defendant has not paid the same. And the plaintiff further

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says, that he is now the lawful owner and holder of the said note, and that the defendant is justly indebted to him thereupon in the sum of three hundred and twenty-six dollars principal, together with interest thereon from the sixth day of September, A.D. 1851.

Wherefore the plaintiff demands judgment against the defendant for the said principal sum and interest, besides the costs.

The defendant answering, admits that at the time mentioned in said complaint, he made his promissory note bearing date on the day, for the amount and payable at the time as stated in said complaint, that he endorsed the same and delivered it to one A. Boscher, a merchant of the city of New York, for the purpose of taking up another note, drawn by this defendant for the same amount, which would become due and payable on or about the 6th of June, 1851, which said last mentioned note had been discounted by one William Beecher, a money broker in the city of New York.

And deponent further says upon information and belief, that said A. Boscher delivered said note in said complaint mentioned to said Beecher, for the aforesaid purpose, that said Beecher at the time said he was and claimed to be the owner of said first mentioned note, and agreed to accept of said note, and deliver up the said note which became due on or about the 6th of June, 1851, to defendant; that after delivery of said note in said complaint mentioned to said Beecher, he refused to deliver up said note due on or about the 6th of June, 1851, to this defendant, but kept both; that said Beecher never paid to this defendant any consideration for the said note in said complaint mentioned, and this defendant claims that the same is void for want of consideration.

And defendant further answering on information and belief, denies that said note in said complaint mentioned, came into the possession of the said plaintiff before the maturity thereof, or that it is owned by the plaintiff.

And defendant further answering upon information and belief, says that said note was passed over to said plaintiff long after the same became due and payable, and with a full knowledge of the facts as above set forth, and with a full knowledge that

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the same was void for want of consideration, and defendant denies that the plaintiff is the lawful owner and holder of the said note, or that defendant is justly indebted to him in the sum mentioned in said complaint.

Upon the trial the plaintiff gave in evidence the note mentioned in the complaint, and proved the interest thereon and rested. The defendant's counsel then opened the cause to the jury, stating in substance the matters set up in the answer. The plaintiff's counsel then moved to exclude the defence as thus opened and as stated in the answer, on the ground that the matters thus stated did not constitute a defence to this suit, though they might form a defence to an action on the note falling due 6th June. The court denied the motion, and plaintiff's counsel excepted.

The defendant called as a witness, Alexander Boscher, who testified that the note in suit was given to renew a note of the same amount given by the defendant, and due on the 6th of June, 1851; the note was made for that purpose; that he took it to William A. Beecher's office and asked for the other note. Beecher was not in; I left this note with his book-keeper and asked him for the other note; I did not get the other note; I left this note and never got the other.

On cross-examination, he testified that he employed the attorney to defend this suit, that he is bound to pay the money to the defendant if a recovery is had in this suit, and that it is defended for his benefit.

The plaintiff's counsel objected, that the witness, according to his own showing, was not competent under the Code; the court overruled the objection, and the plaintiff's counsel excepted.

The defendant then read from the deposition of L. J. Barbeau, taken *de bene esse* (having first proved said Barbeau's absence from the state). The said Barbeau's deposition in substance was, that he first saw the note in question on Boscher's desk, in June, 1851; that it was given to take up another note of the same amount, due about 1st June, 1851; that the second time he saw the note it was in W. A. Beecher's pocket-book in Bulkley & Claflin's store, in the last week of June, 1851.

The following question and the answer thereto, were then

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read by the defendant's counsel from said deposition of said Barbeau :—

When you saw the note in Mr. Beecher's possession at Bulkley & Claflin's, will you state what took place between you and Mr. Beecher at that time in relation to this note? (Objected to by plaintiff.)

A. I was trying to compromise a difficulty between Bulkley & Claflin, and Boscher and Beecher. Mr. Beecher, in searching his pocket-book to see what notes he had in it, that he had received from Boscher, pulled out that one note which I stated to him had been given in payment of the first one, and that he ought to have delivered this last one to Bulkley & Claflin. He answered that was his business; he knew what to do with this note. There was nothing else occurred in relation to this note at that time.

The said question and answer were duly objected to by plaintiff's counsel; the objection was overruled, and they were admitted in evidence, and the plaintiff's counsel excepted.

The defendant then rested.

The plaintiff's counsel then insisted that no defence had been established, and that nothing appeared to affect the plaintiff's right to recover, and that on the evidence as it stood, no notice to the plaintiff or knowledge by him of the matters given in evidence by the defendant being shown or pretended, the plaintiff was entitled to a verdict, and was not required to give any rebutting evidence. The judge ruled that the defendant had established a *prima facie* defence, and that the burden of proof was now on the plaintiff. To this ruling, the plaintiff's counsel excepted.

The plaintiff then called as a witness, William A. Beecher, who testified as follows: The note in suit was at one time in my possession; I found it lying on my desk, one morning about the time of its date; I parted with the possession of it early in July last to the plaintiff; sold it to him at seven per cent.; he advanced me the whole amount of it, deducting seven per cent. interest; the plaintiff married my sister; I presume an entry of the transaction was made at the time in my books. The plaintiff's counsel requested the witness to look at his book, which was then before him, and state the entry made in it as

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to this matter. The defendant's counsel objected, and the judge sustained the objection, and the plaintiff's counsel excepted. I delivered the note to the plaintiff; my business was that of a broker.

Being cross-examined, the witness testified: The plaintiff is a physician, and resides in Brooklyn; he paid me the amount of the note in cash; no agreement whatever was made with him about it; he did not require my endorsement; I told him the note was perfectly good; I had a note of the defendant's before this; it passed through my hands; it was a note I received from Boscher, and for the same amount with this; I found this note on my desk; no message was left with it; my book-keeper told me that Boscher had left it; I gave nothing for it at the time; I had procured money for Boscher many times; I gave Boscher the benefit of the avails of this note by paying the amount to Bulkley & Claflin, or Mrs. Hill, who had loaned him money on Madame Tarin's notes; Bulkley & Claflin held defendant's note falling due in June. I had no message whatever from Boscher; I was not aware when I first saw this note that it was left to renew the other, except by inference; in the course of our business I was so informed, but whether before or after the transfer to plaintiff, I cannot tell; I think I was not so informed within two days after I received the note; I think Barbeau informed me at Bulkley & Claflin's store, and before the transfer to plaintiff; Barbeau was endeavoring to settle with Bulkley & Claflin, who held Boscher's paper; it was after this that I transferred the note and informed plaintiff that this was a good note. I recollect that Barbeau told me I ought to hand this note to Bulkley & Claflin, and I said I would if Boscher would pay over the money he had collected; I told Barbeau that Bulkley & Claflin said they would sue the note they held; I think I informed Boscher and Barbeau that I had parted with this note. I told Barbeau if Boscher would not pay over the money he had received to be paid on the notes of Madame Tarin, we must get the money the best way we could; I recollect a paper being shown me by Boscher; I did not say it was correct, nor that it was correct as a statement of the notes he had turned out; I have no doubt that the paper now shown to me is the one presented to me by Boscher; I cannot

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tell whether this paper contains a statement of all the moneys Boscher had. I was present when Barbeau testified that I had admitted this paper to be correct, and I told the lawyer that it was not true; since Barbeau's examination I have endeavored to find out what Boscher owes to those from whom I procured money for him; I struck the balance and find about \$1000 due from him; he agreed to pay me 15 cents a day on every hundred dollars I raised for him on notes he left with me to sell; I think I had several of Barbeau's notes from Boscher; I frequently received from Boscher checks; one for \$1700 and odd, for which I gave him the whole amount; I gave the check to those who advanced the money; the check was the memorandum of the amount advanced. I did not understand it was a check to be presented to the bank for payment.

On re-examination, the witness testified: Barbeau called and I went with him to Bulkley & Claflin, and I there said that Boscher having withheld money given to him by Madame Tarin to take up notes of hers, on which he had got money, I would not give this note to Bulkley & Claflin; Boscher had received of Madame Tarin about \$500; Bulkley & Claflin held other notes on which they had advanced money to Boscher and which he represented to be good, and they were not; Barbeau assented to what I said as to Boscher having kept Madame Tarin's money, and said Boscher had done very wrong, and had ruined Madame Tarin; Boscher admitted to me that he had used Madame Tarin's money. I after this negotiated this note, and applied the avails to Boscher's debts. At the other conversation I had with Barbeau, I told him that if Boscher would keep money he had received to pay over, we had a right to get it in the best way we could; my reason for negotiating this note as I did, was that Boscher had received and kept the money of Madame Tarin as before stated. There is a balance still due from Boscher to sundry persons, from whom I obtained money for him, of upwards of \$1000.

On further cross-examination, the witness testified: This balance includes no extra interest; Boscher admitted getting the money of Madame Tarin as I have stated; I have received many notes of Boscher as collateral; the money had been

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received by Boscher of Madame Tarin to pay her notes, on which I had raised money for him. Mrs. Hill resides in New Haven, is not a relative of mine; I had not the notes of Madame Tarin in my hands.

The plaintiff rested.

The defendant's counsel then offered to read in evidence from said Barbeau's aforesaid deposition the following question and answer:

Q. Did you ever have any other conversation with Mr. Beecher on the subject of this note, and if so, what was it?

A. I believe in the first days of July, 1851, Mr. Beecher met me in Wall street, and told me he had just discounted Hansen's second note, which is the one here presented, and had discounted it at a fair rate, as it was first rate paper. I asked him what kind of a trade he called that. He answered it was getting money the best way we can, and that Hansen would have to pay that note, when it became due. That was all that was said at that time.

The plaintiff's counsel objected to reading the same, but the judge overruled the objection, and the same was read in evidence, and the plaintiff's counsel excepted.

The testimony here closed.

The cause was then summed up by the counsel for the respective parties, and the judge charged the jury, among other things, that the decision of the cause must depend on the credit to be given to the witness Beecher. If they believed his testimony, they must find for the plaintiff; otherwise for the defendant. They found, as before stated, a verdict for the defendant.

C. P. Kirkland, for plaintiff, argued elaborately the following points, and examined at large the authorities in support of them:

I. The matters of defence, as set up in the answer and stated in the opening, should have been excluded. They did not constitute a defence to this note; for the allegation is that this note was delivered to Beecher, and by him received to take up a

note due 6th June. This note then fulfilled its purpose, and the defendant, if sued on the note falling due 6th June, could make a perfect defence from the facts stated in this answer.

II. The judge erred in ruling that Boscher was a competent witness. It expressly appeared that the suit "was defended for his benefit." He was then inadmissible under the Code, and his interest being unquestioned, he was incompetent at common law. (Code, §§ 398, 399; 3 Code Rep. 24, per Oakley, J.)

III. The testimony of Barbeau was improperly admitted. 1. It related to a conversation as to which no testimony had been given. 2. No foundation was laid for it, as an impeachment of Beecher, by any previous question put to Beecher. 3. It was evidence of the declarations of a former holder of a chose in action, and thus inadmissible. (*Stark v. Boswell*, 6 Hill, 405; *Whitaker v. Brown*, 8 Wend. 490; *Bristol v. Dann*, 12 Wend. 142; *Paige v. Cagwin*, 7 Hill, 361.)

IV. The judge erred in ruling that the defendant had made out a *prima facie* defence, and that the burden of proof was on the plaintiff.

V. The policy of the law which favors and protects the free currency and circulation of negotiable commercial paper cannot be carried out, if such paper can be attacked in the hands of the holder, without any evidence casting suspicion on the motives or conduct of the holder himself.

VI. In many cases, perhaps in most, it would be impossible for the holder to give proof of the facts and circumstances of the transfer to himself, whereas under the present law the defendant could always have it in his power to show these facts and circumstances by examining the plaintiff himself.

VII. The invariable rule in every system of enlightened jurisprudence—viz. that every man is to be presumed innocent and honest till the contrary is shown—would be violated, and indeed reversed, by throwing the *onus* on the plaintiff in this case.

VIII. The uniform doctrine established by the decisions, so far as I have been able to ascertain after diligent investigation, is that laid down by Bronson, C. J., in 6 Hill, 389, viz. "that it will be presumed, till the contrary is shown, that the holder

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took the note in the usual course of negotiating commercial paper,—the *onus probandi* is on the maker to show the fact impeaching the plaintiff's title. (*Nelson v. Corning*, 6 Hill, 336; *Pratt v. Adams*, 7 Paige, 629; *Pinkerton v. Bailey*, 8 Wend. 600; *Waterman v. Barret*, 4 Harring. Del. 311; *Jones v. Wescott*, 2 Brev. 166; 3 Day, 311, per Livingston, U. S. Judge; *Lewis v. — 4 Adol. & Ellis*, 838, 1 Meeson and Welsby, 405.)

IX. Again, the legal nature, character, and incidents of negotiable paper after maturity, and of the same paper before maturity, are essentially different, as clearly stated and illustrated in 1 Sand. Sup. C. R. Rep. (*Leavitt v. Putnam*, 1 Sand. 203, 205.)

The plaintiff, here, was *prima facie* entitled to all the rights of a holder before maturity, because at the time the defendant rested, he had not given a particle of evidence to show,—1st, any knowledge, notice, or information on the part of the plaintiff as to the matters testified to by defendant's witnesses; or, 2d, anything to put the plaintiff on his guard or on inquiry in any manner; or, 3d, in any sense or degree to impeach or affect the plaintiff's title to the note.

X. The verdict is palpably and flagrantly against, or rather without, evidence. Nothing appears in any manner to affect the credit of Beecher. He is unimpeached and uncontradicted, and the verdict is the result of passion, prejudice, or mistake on the part of the jury. But let Beecher's testimony all be stricken out—and this is the worst aspect that can be taken of the case for the plaintiff—and still the plaintiff is entitled to the verdict. Nothing appears to affect him.

R. Lockwood, for the defendant, strenuously insisted, that a new trial ought not to be granted, upon the following grounds:

I. The motion of the plaintiff's counsel, "to exclude the defence as stated in the answer," was properly denied by the judge, as it is a full and perfect defence to the action. 1. It states a diversion or misapplication of the note by Beecher. 2.

It also avers that the plaintiff took it with full knowledge of the fact of such diversion by Beecher.

II. The objection to the competency of the witness Boscher was properly overruled by the judge, as he was clearly competent under the Code—the objection went only to his credibility. (Code, sec. 398.)

III. The objection to the question and answer read from the deposition of Barbeau, was wholly groundless. No ground is stated in the case, nor can any tenable one be conceived of. The evidence went to prove that Beecher had possession of the note at that time.

IV. The judge ruled, correctly, that the defendant had established a *prima facie* case, and that the burden of proof was thrown on the plaintiff. It became incumbent on him, when the defendant rested, to prove, by clear and undoubted testimony, that he had taken the note before maturity, and paid full value for it. (Chitty on Bills, 687, § 638, and cases there cited.)

V. The judge properly ruled out the book of the witness as evidence. A witness is allowed to look at any memorandum or entry of his own, to refresh his own memory, but such entry is of itself never made evidence unless upon the call of the other party.

VI. The objections to the second question and answer of Barbeau, were properly disposed of as the first; no ground of objection can be discovered.

VII. The charge of the judge was the only one that the facts of the case admitted of, and the plaintiff has not excepted to it. The question was purely one of the credibility of the witness Beecher, and is emphatically and exclusively one for the jury, and with whose finding on that point the courts never interfere. (6 Wend., 1 Stark. p. 91, 268.)

VII. The motion for a new trial should be denied with costs.

The judges gave their opinions *seriatim*.

CAMPBELL, J.—The plaintiff declared upon a promissory note, made by the defendant, payable to his own order, and endorsed



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by himself. The defendant admitted in his answer the making and endorsing of the note, and set up, by way of defence, that it was made and endorsed by him for the purpose of being used to renew and take up a previous note for the same amount. That the person into whose possession it came, and who claimed to be the owner of the first note, agreed to accept the note in suit and deliver up the first note. That he afterwards refused to deliver up the first note, and kept both notes, and paid no consideration for the note in question. The answer further sets up that this note was passed to the plaintiff after it became due, and with a full knowledge of all the facts set forth, and with full knowledge that it was void for want of consideration, and therefore denies that the plaintiff is the lawful holder and owner of such note, or that the defendant is indebted. The plaintiff replies and takes issue, averring that he is the holder of the note in good faith, and for a full consideration, and received the same before maturity, and that he had no knowledge as to the alleged purpose for which the note was made, and denied the same.

On the trial the plaintiff moved to exclude the proposed defence, because the matters set up in the answer, if they constituted any defence, would be a defence to an action on the first note, which was paid or cancelled by the acceptance of the note in suit, and would, therefore, not avail the defendant in this action upon the second note. The court denied the motion, and the plaintiff excepted.

The making and endorsing of the note being admitted by the answer, the defendant then proceeded and proved the purpose for which the note in suit was made, as set forth in his answer, and that it came into the possession of the former owner and holder of the first note. The plaintiff also gave evidence tending to show that the former owner and holder of the first note had parted with it, and that he refused to apply the second note to take up the first; but such evidence was very slight. The defendant then rested. The plaintiff then insisted that no defence had been established, that no evidence had been given to show that the plaintiff had any notice or knowledge of the matters set up by the defendant, and that the plaintiff was not required to give any rebutting evidence.

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The judge ruled that the defendant had established a *prima facie* defence, and that the burden of proof was now on the plaintiff, to which ruling the plaintiff excepted.

The plaintiff then called Beecher, the former owner and holder of both notes, who testified that he parted with the note in suit, before its maturity, to the plaintiff for a full consideration and its legal interest, and that he had appropriated the proceeds to the payment of other indebtedness, due from one Boscher, who was the party who had received both notes from the defendant, and for whose benefit the first note appears to have been discounted. The jury, notwithstanding, found a verdict for the defendant.

The objection taken by the plaintiff on the trial, that the matters stated in the answer do not constitute a defence to this suit, we think, is fatal to the defendant. That part of the answer is as follows—he says that said “Boscher delivered said note in said complaint mentioned to said Beecher, for the aforesaid purpose; that said Beecher, at the time, said he was and claimed to be the owner of said first mentioned note, and agreed to accept of said note, and deliver up the said note, which became due on or about the 6th of June, 1851, to defendant; that after delivery of said note in said complaint mentioned to said Beecher, he refused to deliver up said note, due on or about the 6th of June, 1851, to this defendant, but kept both; that said Beecher never paid to this defendant any consideration for the said note in said complaint mentioned, and this defendant claims that the same is void for want of consideration.” The allegation is, that Beecher was the holder of the first note, and received the note in suit, agreeing to give up the other. The effect of his receipt and agreement was to destroy in his hands the first note. Suppose, immediately after the 6th of June, when the first note fell due, it had been put in suit by Beecher, then the matters set up in this answer would, if proved, establish a complete defence. This objection might have been taken by demurrer, and was properly taken, we think, on the trial. The verdict is, too, against the weight of evidence; but it is unnecessary to consider this point.

It was claimed by the counsel for the plaintiff, on the trial, that it was not sufficient for the defendant simply to show a

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fraudulent misapplication of the note, but that it was his duty to proceed and prove that the plaintiff had taken it with notice and without consideration, and this point was pressed with much earnestness upon our attention on the argument. It is not to be denied that there has been considerable difference of opinion as to what is the true rule in cases of this kind—that is, upon whom rests the burden of proof—and we shall consider this question briefly for the purpose of explaining the views of this court. In *Holme v. Karsper*, 5 Binney, 469, decided in 1813, Chief Justice Tilghman says,—“In the first instance it is presumed that every man acts fairly. It lies on the defendant, therefore, to show some probable ground of suspicion before the plaintiff is expected to do anything more than produce the note on which he founds his action. But this being done, it is reasonable that the holder should be called on to rebut the suspicion. All that is asked of him is to show that he has acted fairly and paid value;” and the learned judge considers these the principles of the mercantile law. In *Munroe v. Cooper*, 5 Pickering, 412, the court says,—“We agree that a new trial in this case must be granted, for the purpose of allowing the defendants to prove, if they can, that there was fraud practised in the inception of the note, or that it was fraudulently put in circulation. This fact being established will throw upon the plaintiff the burden of proof, to show that he came by the possession of the note fairly, and without any knowledge of the fraud.” In *Bailey v. Bidwell*, 13 Mees. & Welsb. 73, Baron Parke says,—“It certainly has been, since the later cases, the universal understanding, that if the note were proved to have been obtained by fraud or affected by illegality, that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and would place it in the hands of another person to sue upon it; and that such proof casts upon the plaintiff the burden of showing that he was a *bona fide* endorser for value.” That has been considered in later times as settled, and in this the Court of Exchequer concurred. In the more recent case of *Smith v. Braine*, in the Queen’s Bench, reported in 3d English Law and Equity Reports, 379, the case of *Bailey v. Bidwell* is commented on and approved. “Since the new rules,” says Lord Campbell, Chief Justice, “judges have, with entire appro-

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bation, directed juries that, when the bill was illegal in its inception, or when the immediate endorser to the plaintiff obtained possession of it by fraud, the want of consideration, as between him and the plaintiff, may be presumed, and in such case the *onus* is cast upon the plaintiff of proving that he gave value. In a still more recent case, decided in the Court of Exchequer in June, 1851, reported in 4th English Law and Equity Reports, 531, *Harvey v. Towers*, the same rule is enforced, Platt, Baron, observing that "the cases of *Bailey v. Bidwell* and *Smith v. Braine*, were the decisions of eight judges, and that the casting the burden of proving consideration on the holder of a bill, shown to be affected by fraud, was an extremely just rule, as he must best know what consideration he gave for it." Such, also, would seem to be the rule in our own state. Thus, in *Vallett v. Parker*, 6 Wendell, 615, Savage, Chief Justice, "the holder of a bill or note need not, in the first instance, show a consideration; possession proves property; but if there are any suspicious circumstances as to the *bona fides* of his possession, and the defendant has a good defence against the payee, then he must show that he paid value for it. For instance, if the note has been lost or stolen, or fraudulently put into circulation, &c., then the plaintiff must show that he came lawfully and fairly by it, and paid value for it." (See also *Woodhull v. Holmes*, 10 John. R. 231; *Conroy v. Warren*, 3 John. Cases, 259.) The rule is laid down very distinctly and clearly in 2d Greenleaf on Evidence, § 172,—“Even in an action by the endorser against an original party to a bill, if it is shown on the part of the defendant that the bill was made under duress, or that he was defrauded of it, or if a strong suspicion of fraud is raised, the plaintiff will then be required to show under what circumstances, and for what value, he became the holder. It is, however, only in such cases that this proof will be demanded of the holder; it will not be required where the defendant shows nothing more than a mere absence or want of consideration on his part.” The reason given in *Bailey v. Bidwell* is, that where there is fraud, the presumption is, that he who has been guilty will part with the note for the purpose of enabling some third party to recover upon it; and such presumption operates against the holder, and it devolves upon him to show

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that he gave value for it. Where the defence grows out of mere absence, or want of consideration, no such presumption arises. (The dictum of the judge in *Nelson v. Corning*, 6 Hill, 336, must be considered as made with reference to the particular facts of that case, and not laid down as a general rule.) We are of opinion that in this case the ruling of the judge on the trial, that the defendant had made out a *prima facie* defence, and that the burden of proof was on the plaintiff, was correct. But there remains a further question for consideration. When the plaintiff shall have shown that he is a holder for value, upon whom does it rest to give the proof as to notice? We think that the burden of proof shifts back upon the defendant. It may often occur that the plaintiff, in giving proof of value paid, will furnish for the defendant evidence of notice in cases where there has been collusion. But where the plaintiff is really a *bona fide* holder, it may well be, that he may prove the payment of value without being able to give any evidence as to notice, because none exists. Besides, as the law now is in this state, the defendant has always the means of proof in his own power, in all cases, where he can rely upon the oath of the plaintiff, because he can at will place him on the stand as a witness. In cases, therefore, where there is fraud, or strong suspicion of fraud, made out by the defendant, the holder of a promissory note, or bill of exchange, who sues for its recovery, must then show that he received it before its maturity, and for a valuable consideration; and if he succeeds in this proof, the defendant, to defeat a recovery, must establish, if he can, that the note was received by such holder with notice of the fraud.

But for the reasons first given in this cause, there must be a new trial, costs to abide the event.

BOSWORTH, J.—I think Boscher was incompetent as a witness. The note in suit was made by the defendant for his accommodation, and delivered to him for the purpose of taking up another note also made by the defendant for his accommodation, and at the time outstanding. If a recovery be had by the plaintiff and the money is collected from the defendant, the amount can be recovered from Boscher with the costs of the suit. On the other hand, if the defendant succeeds, the verdict at once

+ Nelson v. Corning & Co.

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exonerates Boscher from all liability to the maker. In addition to this, he is actually defending this suit by an attorney retained by himself for the purpose. The suit is defended for his direct and immediate benefit, and is actually defended by himself. A verdict in favor of the defendant as directly, immediately, and absolutely, discharges Boscher from all liability to the maker, as it does the maker from all liability to the plaintiff. The result of a verdict for the defendant is of itself as beneficial to Boscher as to the defendant.

Such a party was unquestionably incompetent before the Code. That provides, in § 398, "that no person offered as a witness shall be excluded by reason of his interest in the event of a suit." The succeeding section declares that § 398 shall not apply to any person for whose immediate benefit it is defended.

Such a person stands in the same position as he did before the Code; § 398 has no application to him; his interest in the event renders him equally incompetent as before. As to him, the Code has not changed the pre-existing law. That made him incompetent, and as to him the law is unchanged. (7 Barbour, S. C. R. 161, 162.)

This court decided at a late general term, in *Howland v. Willetts*, that in an action against the defendant for levying as sheriff, on personal property claimed by the plaintiff to be his, on an execution against a third person, the plaintiff in the execution, who had indemnified the sheriff for making such levy, was an incompetent witness for the defendant. That decision would seem to cover the precise question presented here, and be conclusive in this court against the competency of the witness.

With respect to the main question in the cause, I understand the rule to be well settled both in this country and in England, that where the maker of a note in a suit by an endorsee, proves that the note was lost by or stolen from him, or has been fraudulently put in circulation, the *onus* is then thrown on the plaintiff to prove that he bought it before maturity, *bondâ fide*, and for value. (3 J. C. 260, 3 *Conroy v. Warren*, 6 Wend. 622; *Vallett v. Parker*, 1 Hall, 562; *Fulton Bank v. Phœnix Bank*.)

In January, 1851, it was decided by the Queen's Bench in *Smith v. Braine* (3 L. & E. R. 379), and later in the same year by the Court of Exchequer in *Harvey v. Towers* (4 L. & Eq.

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R. 531), that on general principles, irrespective of any questions arising upon the pleadings, when the maker proves that the bill is founded on illegality or fraud, or has been the subject of illegality or fraud, the plaintiff, though an endorsee, is compelled to show himself a *bonâ fide* holder for value. Such proof in behalf of the maker raises the presumption that the endorsement to the plaintiff was without consideration. The plea in each of those cases, alleged among other things, that the bill was endorsed to the plaintiff without consideration. Both courts held that this allegation, or some equivalent one, was essential to a perfect plea, but did not require the defendant to prove that the plaintiff paid no consideration.

The rule being settled, it is useless to discuss its wisdom. But it may be briefly and I think justly said, that such a rule presents no obstacles to a free circulation of negotiable paper, in the honest transaction of ordinary business. Presumptively, there is no practical difficulty in a man of business being able to show when and of whom he received a bill or note, and what he paid for it. There may be exceptions to this, but they must be comparatively few. So there is presumptively no difficulty in the way of a bank proving when and for whom a note was discounted.

On the other hand, when a note has been fraudulently put in circulation, and more especially if it has been lost or stolen, the maker has no means of ascertaining through what hands it has passed, or how or when the plaintiff became the owner.

I think it was correctly ruled at the trial that the evidence established a *prima facie* defence. It showed that the note had been left at Beecher's office in his absence, to take up the note for which it was to be substituted. That the latter was at the time in the hands of third persons. That Beecher, instead of taking it up, negotiated the note in question, after being notified by his clerk of the purposes for which it was left, and thus fraudulently misapplied it. This was sufficient to cast the burden on the plaintiff of showing himself a holder for value before maturity, and of course established a *prima facie* defence.

Whether the evidence given was competent under the pleadings, and whether the facts set up in the answer constituted a defence, even if true, are entirely different questions.

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The answer states that the note in suit was delivered to Beecher for the purpose of taking up the other note; that he agreed to accept of it and deliver up the other note; that after the delivery he refused to deliver up the other note, but kept both. If these facts are true, I think the note in suit was a satisfaction in Beecher's hands of the first note, and his acceptance of it, under the circumstances stated, would be a perfect defence to a suit by him on the old note. If so, the note in suit was a valid note in his hands. There is no allegation that he did not in fact hold the first note at the time the second was accepted, and that was agreed to be given up, or that he has not at all times since continued to hold the latter in his own right. According to the answer, the only ground of complaint is, that Beecher has not given up the first note after having received the second in lieu of it. The case made by the proof is, that the second note was left at his office in his absence, for the purpose of being substituted for the first. And though he was informed by his clerk of the purpose for which it was left, he suffered the first note to mature and continue in the hands of a third person, to whom he had previously negotiated it, and fraudulently negotiated the note in suit for his own benefit.

The allegation of the defence was unproved in its entire scope and meaning, and the case is one on which there was an entire failure of proof. (Code, § 171.)

The court at the trial cannot direct the pleading amended, or the fact to be found according to the evidence, in such a case. (§ 169, 170, 171.) It can only do this where the variance between the pleading and proof is not calculated to mislead the plaintiff in maintaining his action, and not where the defence proved differs, in its entire scope and meaning, from that set up in the answer.

I think a new trial should be granted with costs to abide the event, on the grounds that Boscher was improperly admitted as a witness, and that the objection was well taken that the defendant should not have been allowed to prove the new matter stated in his answer, as it constituted no defence. Even as the Code was, when these pleadings were framed, only such allegations of new matter in answer as are *material*, are to be taken as true on a failure to put them in issue by the reply. (Code, § 168.)

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If the plaintiff had not put them in issue in his reply, he could not have been prejudiced by it, if they do not constitute a defence. For if they do not, they are not material, and might have been stricken out on motion, as irrelevant or redundant.

DUER, J.—I cannot assent to the opinion that Boscher was an incompetent witness, merely from the fact, that he was personally liable to the defendant in case a judgment should be obtained against him. It may be true, that Boscher had rendered himself thus liable by delivering the note in suit without obtaining a return of that it was meant to renew, and that this liability gave him a direct and certain interest in the event of the suit, which, as the law stood before the adoption of the Code, would have been sufficient to exclude him ; and it is also true, that in all cases where a witness is thus interested in favor of the party by whom he is called, it may be justly said, that the suit is prosecuted or defended, as the case may be, for his benefit. But if every person is to be excluded as a witness, who will incur a certain loss, or derive a certain gain, from the determination of the suit in favor of the party by whom he is called, that provision of the Code, which declares that “no person offered as a witness shall be excluded by reason of his interest in the event of the action” (Code, § 398), will be, in effect, repealed, since, when the Code was adopted, the rule, I apprehend, had been settled by the modern decisions, that it was only a direct and certain interest, in the event of the suit, that could operate, as a ground of exclusion. It is evident, however, that the two provisions in the Code, that which excludes as witnesses those “for whose immediate benefit the suit is prosecuted or defended” (§ 399), and that which admits those, who are interested in the event of the suit, must receive, if possible, a consistent interpretation ; and assuredly a construction cannot be given to the former by which the very extensive, and, I think, beneficial change, in the law of evidence, which the latter was meant to effect, shall be stripped of its meaning and vitality, and rendered wholly inoperative and void. There are no other means, however, as it seems to me, by which these two provisions can be reconciled, and the consequence that I have stated, be prevented, than by giving to the words “for whose immediate benefit

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the suit is prosecuted or defended," a far more restricted interpretation than that which judges, in some cases, seem disposed to adopt. The provisions can only be reconciled by construing section 399, as it was plainly meant to be construed, not as superseding the general rule, which the section immediately preceding declares, but merely as excepting certain cases from its future application; and the proper inquiry, therefore, is how shall the cases thus meant to be excepted be limited and defined, so as to leave an ample scope for the operation of the general rule, that the interest of a witness, in the event of the suit, shall not be permitted to exclude him.

In answering this inquiry, I shall not, in order to justify my own views, now enter on a critical examination of former decisions, but shall content myself with saying that the exceptions in § 399 must, in my judgment, be confined to those who are, in reality, parties to the suit, that is, are either parties on the record, or parties in interest. The words in the section, "parties to the action," I construe as meaning only a party on the record, and those that immediately follow, "nor to any person for whose immediate benefit it is prosecuted or defended," as applying exclusively to a person who is a party in interest, and who, as such, will in law be as effectually concluded by any judgment that may be rendered, as a party to the record. The latter words, thus construed, will be found to embrace two classes of cases. First, when the party on the record calling the witness, is a nominal party only, and the real interest in the suit itself, is in the witness, as when the party is a trustee and the witness a *cestui que trust*, who will either have an immediate right to the money that may be recovered by the party calling him, or sustain an immediate and necessary loss from an adverse judgment; and second, when the party calling the witness, although not merely nominal, yet prosecutes or defends the suit, at the request of, and under a positive indemnity from, the witness. The conclusive reason for this second exception is, that a person under whose indemnity the action is prosecuted or defended, is in judgment of law a real party to the suit, who, as such, has a right to control the proceedings, and is, in all respects and for all purposes, concluded by the

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judgment (1 Greenleaf on Evid. p. 523 ; 1 Smith Lead. Cases, Duchess of Kings. case ; *Morgan v. Thorn*, 9 Dowl. 228 ; *Rapelyea v. Bruce*, 4 Hill 19 ; *Bates v. Stanton*, ante.) I add, that after much reflection, I am satisfied, that if any other exceptions than those, which have been stated, shall be admitted from the general rule that a witness is not disqualified by his interest in the event of the suit, the rule itself, if not wholly abrogated, will be so narrowed, in its application, as to be robbed of its chief utility and value. Courts of justice will find it difficult, if not impossible, to trace a clear line of distinction between the cases in which witnesses are to be excluded and those in which, notwithstanding their interest, they ought to be admitted ; and in the result, the inconvenient and inequitable rules of the common law that were meant to be abolished—if not in terms, yet in substance—will be restored. Construing, however, the words of the Code, “ for whose immediate benefit the suit is prosecuted or defended,” in the limited sense that I have given to them, it by no means follows that Boscher was a competent witness. On the contrary, I entirely agree with Judge Bosworth, that by his own showing he was incompetent, and that the objection to his testimony taken upon the trial ought to have been allowed. He admitted upon his cross-examination, not merely that he was defending the suit at his own expense, but that he was bound to pay to the defendant the money that might be recovered—by which I understand him to mean that he had bound himself, by an express promise, to satisfy the judgment, if a judgment were recovered. His actual liability was a sufficient consideration for this promise, and his agreement to indemnify the defendant, consequently, valid. The case, therefore, falls within one of the exceptions that I have admitted to exist, and is not distinguishable from that of the witness who was excluded by the court in *Howland v. Willetts*.

Upon the other questions in the cause I agree, substantially, with my brethren, and deem it unnecessary to add any remarks to the observations which they have made. I am not, however, prepared to say, that had the defence set up on the trial been properly admitted under the pleadings, the verdict could not

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be set aside as against the weight of evidence. This is not a question, however, which it is necessary to discuss; and in the result, that a new trial must be granted, we all concur.

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The defendant, in the assignment of a lease to the plaintiff, covenanted that "the assigned premises were free and clear of and from all former and other grants, bargains, and incumbrances whatsoever." The defendant, however, by a prior deed, had bargained, sold, and assigned to one Sloan the privilege to use a wall on the premises as a party wall of a building, to be erected during the whole unexpired term of the lease.

Held, that the conveyance so shown was not to be construed as a mere license to use the wall, but was an absolute and irrevocable grant creating a permanent encumbrance, and was therefore a breach of defendant's covenant with the plaintiff.

It appearing that Sloan, in the exercise of the privilege granted him, had actually used, and still used, the wall in question as the party wall of a building he had erected—*Held*, that these facts were a virtual eviction of the plaintiff, entitling him to more than nominal damages. The rule of damages, when there is only a partial eviction, is, that a portion of the original consideration money can be recovered, bearing the same ratio to the whole consideration as the value of the land to which the title has failed bears to the value of the whole premises.

It not appearing that the damages found by the jury exceeded the proportionate sum to which the plaintiff was entitled, and no such question having been raised in the court below—*Held*, that the verdict could not be disturbed.

Held, that the allegation that the use by Sloan of the privilege granted to him occasioned no damage to the plaintiff's building, was no answer to the plaintiff's claim for damages.

Judgment for the plaintiff affirmed with costs.

(Before DUEK, CAMPBELL, and BOSWORTH, J.J.)

October 22; November 20.

APPEAL from a judgment at special term.

The following are the material facts in the case:—

The defendant owned an indenture of lease, dated February 1st, 1851, for the term of twenty-one years. On the 31st of May, 1851, by deed, he sold and assigned it to the plaintiff for the sum of \$4,000, subject to a mortgage executed by the

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defendant to secure the sum of \$2,000 ; and subject also to the rents, covenants, conditions, and provisions contained in the assigned lease. The defendant covenanted that "the assigned premises now are free and clear of and from all former and other gifts, grants, bargains, sales, leases and executions, back rents, taxes, agreements, and incumbrances whatsoever, except said mortgage." This deed of assignment was recorded June 18, 1851.

The defendant, by an instrument in writing, signed and sealed by himself and Smith Sloan, dated on the 21st of May, 1851, had sold and assigned to Sloan the privilege of using as a party-wall one of the end walls of the building on the demised premises, free and undisturbed for the whole term of the lease. Sloan not to be at liberty to insert more than five tiers of beams in the wall, nor to break into the wall more than four inches in depth, four in width, and ten in length. This was recorded the 3d of June, 1851, and Sloan paid for the grant or privilege \$100.

This action was brought to recover the value of the privilege granted to Sloan, on the ground that the grant was a breach of defendant's covenant contained in the deed of assignment from him to the plaintiff. At the time this action was commenced Sloan had entered upon the erection of a building on a lot adjoining the wall in question, and had inserted one tier of beams in this wall.

The action was tried before Chief Justice Oakley, who "instructed the jury to render a verdict for the plaintiff for the value of the privilege granted to Smith Sloan, subject to the opinion of the court on the questions, whether the privilege granted by defendant to Smith Sloan was a breach of the covenant contained in defendant's assignment to the plaintiff, and if so, whether the plaintiff can recover for the value of the privilege so granted, inasmuch as the same was not any damage to plaintiff's building."

The jury rendered a verdict for the plaintiff for \$150.

On a case containing the evidence and the questions reserved at the trial, Justice Duer, at special term, adjudged that the grant of the privilege was a breach of defendant's covenant, and gave judgment for the plaintiff. From his order and the

judgment entered pursuant to it, the defendant appeals to the general term.

J. Cochrane for the defendant, the appellant, contended that the judgment was erroneous, and ought to be reversed, upon the following grounds:—

The action is for the value of the privilege—

The defendant, by his assignment of lease dated 31st May, 1851, covenants that the assigned premises are free and clear of and from all former and other gifts, grants, bargains, sales, leases, judgments, back rents, taxes, assessments, and encumbrances whatsoever (except a certain mortgage).

The defendant, on 21st May, 1851, bargained, sold, and assigned to Smith Sloan the privilege of using as a party-wall, a certain wall standing on the north end of a lot (the lot in question), to have the use of the wall, free and undisturbed, for and during the term for which the defendant leased it—

In case of injury to the wall, the agreement to cease—

It seems the use of the wall was no injury to it.

I. The selling by defendant to Sloan of the privilege to use one of the walls of the house in question for twenty years, conveyed no interest in the realty, and consequently there was no breach of defendant's covenants against encumbrances. A license to enjoy a beneficial privilege is not an interest in lands within the statute of frauds. (3 Kent, 472, 7th ed.)

A license granted for a temporary purpose, as to erect a dam, terminates with the decay of the dam.

A license passes no estate, it merely confers a right or privilege. (1 Hilliard, 146.)

A license is an authority to do a particular act, or series of acts, upon another's land, without possessing any estate therein. (3 Kent; 4 Sand. Ch. R. 91-2.)

There is a distinction between a license and a covenant. (15 Wend. 380, 387-9, 90, 91; 6 Hill, 64; 7 Ed. 3 Kent, 452; 4 Sand. Ch. R. 73; 5 Barb. 550, 555; 2 Well. 116.)

It was a license to use in a certain manner for a limited term.

II. The plaintiff has not been disturbed in his possession.

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He could not maintain ejectment against Sloan if the defendant had not sold him the privilege. (4 Kent, 571; 4 Mass. 629; 10 John. 258.)

Barnard, contra, made and argued the following points:—

I. The privilege to Sloan was a grant, bargain, and sale of a right in the assigned premises and building, and deprived the plaintiff of the full ownership of the lot and building. He could not take down the wall to alter the building during the term of the lease.

II. The privilege was a valuable privilege, and the plaintiff was entitled to the benefit of that value, if he was willing to sell it.

III. The plaintiff is entitled to recover for the value of the privilege, even though it was not any damage to the building—a grant of a right of way over that part of the lot not covered by the building would not have been of any damage to the building, and yet it would have been a breach of the covenant, and would lessen the value of the premises assigned.

By THE COURT. BOSWORTH, J.—The defendant's counsel insisted that the sale to Sloan of a privilege to use one of the walls in question as a party wall for twenty years conveyed no interest in the realty, and therefore was no breach of defendant's covenant to the plaintiff. That it was a mere license, and passed no estate in the leasehold premises.

The terms of the covenant (among others) are, that "the assigned premises now are free and clear of and from all former and other grants, bargains, and encumbrances whatsoever."

By the deed to Sloan, the defendant did "bargain, sell, and assign" to him the privilege to use the wall as a party wall of a building to be erected adjoining to it, for and during the whole unexpired term of the lease. This was an absolute and irrevocable grant of a right to use a portion of the premises assigned to the defendant, and excluded the possibility of the defendant making the same use of the wall, or selling and granting to any one the right to so use it.

It is sufficient to say that the right granted was not revocable,

and was permanent. It would endure as long as the lease of the premises affected by it. It is in the nature of an easement. It creates a paramount right to the extent of the interest granted, and we have no doubt that it is an encumbrance within the proper meaning of the term as used in the defendant's covenant. (*Prescott v. Trueman*, 4 Mass. 627. *Wolfe v. Frost*, 4 Sand. Ch. R. 72-89.)

The more important question relates to the proper rule of damages.

The general rule is, that in an action upon a covenant against encumbrances, the plaintiff will recover only nominal damages, unless he has been evicted or has satisfied the encumbrance. He may pay off the encumbrance if he chooses to do so, and in such a case will recover the amount paid with interest, if it do not exceed the consideration paid for the land. (*Delavergne v. Norris*, 7 J. R. 358. *Hall v. Dean*, 13 J. R. 105.)

In *Prescott v. Trueman*, Ch. J. PARSONS says that, "where a subsisting easement is alleged as the encumbrance, the injury arising from the easement, or the fair and reasonable price paid by the grantee to extinguish it, of which the jury will judge, is the measure of the damages."

The general rule undoubtedly is that in an action upon a covenant against encumbrances, whether it be a judgment, mortgage, right of dower, or a paramount right to the land or some part of it, if he has not paid off the mortgage or judgment, or extinguished the right of dower or paramount right, as the case may be, he shall recover only nominal damages. The reason of the rule is, that he shall not be permitted to recover back the consideration paid for the land, and still hold it on a contingency that he may never be disturbed in his possession. He must first extinguish the encumbrance, so that it cannot afterwards prejudice the grantor before he will be permitted to recover the amount of it, or the amount fairly and necessarily paid to extinguish it.

In this case the easement has not been extinguished, but is still subsisting. In the nature of things it cannot well be extinguished, except by the plaintiff's purchasing the dominant tenement. It cannot be deemed feasible to extinguish it, by a

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purchase or assignment of the privilege, without the payment of much more than the privilege is found by the jury to be worth.

Sloan has entered into the use and enjoyment of the privilege granted to him, has erected a building adjoining the one in question, and made a wall of the latter a party wall of the newly erected building. His occupation and possession of the wall of the building in question, so far as it is used as a party wall of the new building, is exclusive of, and excludes the use of it by any other person for the same purpose.

It is virtually an eviction of the plaintiff by force and virtue of a grant from the defendant to Sloan, co-extensive with the nature and extent of the interest granted. If instead of the grant in question, the defendant had underlet for the unexpired term a specific parcel of the assigned premises, and the lessee had entered into possession under his lease, what would be the measure of damages?

The rule seems to be, in case the eviction be only of a part of the land purchased, that a recovery under the covenant of seizin can be had for only a ratable part of the original price, and it must bear the same ratio to the whole consideration, that the value of the land to which the title has failed, bears to the value of the whole premises. And it is also laid down as settled law in this state, that "the ultimate extent of the vendor's responsibility, under all or any of the usual covenants in his deed, is the purchase money with interest." (4 Rent Com. 476, 477; 5 J. R. 49; 12 id. 126; 10 Wend. 142.)

Assuming this to be the true rule, and that the plaintiff may be deemed to have been evicted to the extent and according to the nature of the interest granted to Sloan, the technical expression of the proper measure of damages would be such sum as represents truly the relative value of the interest granted to the value of the whole premises.

Whether such proportionate value is more or less than the actual value of the interest granted, does not expressly appear. No objection appears to have been made on the trial, nor was it taken on the argument, that such relative value might possibly be less than the actual value of the privilege granted.

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The objection taken on the argument was, that only nominal damages could be recovered, while the easement or privilege was existing and unextinguished.

We do not, under the peculiar facts and circumstances of this case, deem it a duty to grant a new trial, on the mere conjecture, that on investigation the relative value of the interest granted to that of the whole premises, may possibly be less than the actual value of the interest granted, as no such position has been taken by the defendant's counsel.

The affirmation, that the privilege granted "was not any damage to the plaintiff's building," we understand to simply mean, that the exercise and enjoyment of the privilege do not impair its stability, or the value of its use for the purposes for which it was designed and is occupied.

Such a fact is no more an answer to the plaintiff's claim to damages for a breach of the covenant, than the fact that a failure of title to, or a prior lease of part of a farm granted, is no damage to the residue, would be an answer to an action for damages on a covenant of seizin covering the whole. The residue might be as valuable in and of itself, without as with that, the title to which had failed. That would be no reason why the grantee should not recover a proportionate part of the consideration, to indemnify him for the loss of that, from which he had been evicted by a paramount title.

The judgment appealed from must be affirmed with costs.

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It is sufficient evidence of an ouster in an action brought by a tenant in common to recover the possession of his share of lands in the possession of the defendant, that the original entry of the defendant was hostile to the plaintiff's rights, and the possession that followed exclusive and adverse.

It is a presumption of law that the possession of the defendant retained its original character, and this presumption, in respect to the plaintiff, was held not to be repelled by the fact that the defendant had obtained a lease from the other tenants in common covering their respective shares.

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Sembla, that the denial in the defendant's answer of all right or title in the plaintiff was equal to a confession of ouster, superseding the necessity of proof upon the trial.

Judgment at special term, dismissing the complaint, reversed, and new trial granted.

(Before OAKLEY, Ch. J., PAINE and BOSWORTH, J.J.)

November 8; December 11, 1852.

THIS was an action to recover the possession of an undivided moiety of three lots of ground in the city of New York. The complaint averred the seizin in fee of the plaintiff, the possession of the defendant, and the dispossession by him of the plaintiff. The answer denied all right, title, or interest, in the plaintiff, and that the defendant had at any time dispossessed him of the premises, or of any part thereof.

The cause was tried before Mr. Justice CAMPBELL, at a Special Term in April, 1852, and upon the trial the following stipulation in writing, signed by the counsel of the parties, was read in evidence.

It is admitted by the counsel for the respective parties, that at the time stated in the complaint, the above-named plaintiff was seized in fee simple of the one undivided half part of the premises described in the complaint as the grantee of William Kain, who, by deed dated 1845, conveyed the same to him who became seized thereof as one of the heirs-at-law of Francis Kain, deceased, and that at the time of the commencement of this suit, the above-named defendant was in the possession of the said premises.

And it is further admitted by said counsel, that on the first day of November, 1838, the said Francis Kain, then in full life and seized of said premises, made a lease thereof in writing to John Stroud and William Rankin, for ten years and six months from that date, at an annual rent of seven hundred dollars until May 1st, 1840, and nine hundred and fifty dollars thereafter, which lease was duly acknowledged and recorded, and contained a covenant in the words following, to wit: "And it is mutually agreed by and between the parties hereto, that after the expiration of the term hereby granted, provided the said parties of the second part shall, previously to such expiration, three months, notify the party of the first part, of such an intention on their part, the said parties of the second

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part may have a renewal of this lease for a further term of five years, at an annual rent to be ascertained by two disinterested persons, one to be chosen by each of the parties hereto, and if they cannot agree, they to choose another indifferent person, and the valuation of the demised premises (without improvements) made and set down in writing by any two of such persons, shall fix such rent for such renewed term of five years, to be estimated at six per cent. per annum, on such valuation, and such renewed lease shall also contain similar clauses with this lease, except as to the renewal thereof."

That said Francis Kain died in 1844, intestate, leaving him surviving, Henrietta Kain, his widow, and no children or descendants, and his heirs-at-law were his brother, William Kain, and Amelia Ann, wife of Washington M. Postley, Agnes, wife of Samuel B. Postley, Francis Kain, James Kain, and Abraham B. Kain, the children of his deceased brother, James Kain.

That said lease was duly assigned by the said John Stroud, to the said William Rankin, and afterwards and before the expiration of the said lease said William Rankin departed this life, having first made and published his last will and testament, by which he appointed John T. Fisher, the executor thereof; that said will was duly proved before the surrogate of the county of New York, and letters testamentary thereon were duly granted by said surrogate to the said John T. Fisher; that afterwards and about the first of May, 1850, the said John T. Fisher, as such executor, assigned said lease and all the covenants therein contained, to the said defendant, Daniel Rankin, who then entered into the possession of the said premises; that the said Henrietta Kain, the widow of Francis Kain, departed this life on or about the first day of September, 1851, and that new leases were granted of those parts of the said premises, whereof Amelia Ann, the wife of Washington Postley, Agnes, the wife of Samuel B. Postley, James Kain and Abraham B. Kain, were seized as heirs-at-law of Francis Kain, deceased, for the balance, to wit: two years and nine months from August 1, 1851, and that said new leases were granted and made prior to the commencement of this suit. And that the said defendant has never paid any rent to the plaintiff, and

further, that previous to the expiration of the said lease and within the three months mentioned in said covenant in said lease, the said William Rankin notified the agent of the parties seized of said premises, that he would like to have a renewal of said lease to Stroud and Rankin.

Upon this state of facts, and after hearing the counsel, the learned judge dismissed the complaint with costs.

The plaintiff appealed from this judgment, and the appeal was now heard.

A. W. Clason, Jr., for plaintiff, insisted that the judgment ought to be reversed, and a new trial granted, and relied upon the following points and authorities,

I. The possession of the defendant was in its inception hostile to the possession of the plaintiff. The defendant entered under an assignment of an expired lease, and as to the plaintiff claims to hold against his right of possession.

II. The subsequent hiring from some of the heirs of Francis Kain did not alter the relations of the parties to this action. They let their respective shares of the premises, but as to the undivided moiety of the plaintiff the possession was not thereby affected.

III. The estates of tenants in common have the sole unity of possession; that unity once destroyed, the tenancy in common is at an end.

IV. The plaintiff and the heirs of Francis Kain are no longer tenants in common; the defendant, and those heirs of Francis Kain who let to him, are now tenants in common.

Wallis, contra, claimed the affirmance of the judgment upon the following grounds—

I. The defendant was, at the time of the commencement of the suit, a tenant in common with the plaintiff, of the lands described in the complaint, and the plaintiff was bound to prove actual ouster. (2d Rev. St. 403, sec. 28 (3 Ed.) *Edwards v. Bishop*, 4 Comstock, R. 61.)

II. The possession of the defendant is the possession of his

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landlord, (3 Rev. St. 333, sec. 13.) The tenant in occupation must be made the defendant in an action of ejectment, and is entitled to the same defence his landlord would be entitled to make.

III. The possession of the defendant was never adverse to the plaintiff, for he is rightfully entitled to the possession of one undivided half of the premises.

IV. The judgment at special term should be affirmed with costs.

BY THE COURT. OAKLEY, CH. J.—The only question in this case is, whether the facts admitted furnished sufficient proof of an ouster, so as to enable the plaintiff, who claims only an undivided moiety of the premises, to maintain the action.

It is admitted that the original entry of the defendant was under the assignment of a lease, which had then expired. As his entry was therefore without title, it was in its nature hostile to the rights of the true owner, and the occupation that followed, in fact, exclusive and adverse. Nor do we think that this construction is at all altered by the fact, that the expired lease contained a covenant of renewal. The covenant gave no right of entry.

Without resorting to the evidence, we incline strongly to the opinion, that the denial in the defendant's answer of all right, title, and interest in the plaintiff, is an admission, that his own possession is adverse, and may therefore well be treated as equivalent to a confession of ouster, superseding the necessity of proof upon the trial; but as we do not mean to place our decision upon this ground, it is not necessary to state the reasons that incline us to the opinion.

The ground upon which we place our decision, is, that the character of the defendant's possession must be determined by the nature of the claim under which he originally entered, and as, in its inception, this was clearly hostile to the rights of the plaintiff, and the possession of the defendant under it in fact exclusive, we think there is sufficient in the case to show such an ouster by the defendant, as destroyed the tenancy in common, and entitled the plaintiff, by bringing this suit, to treat him as a trespasser. As the possession of the defendant was in

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its origin hostile, the presumption of law is, that it remains so. Nor is this presumption met or weakened by the fact, that he has obtained a lease from the other tenants in common of their respective shares. By his acceptance of this lease, his possession, in respect to them, has ceased to be adverse, but this is no evidence that it has ceased to be adverse, in respect to the undivided moiety of the plaintiff. There was no necessity for making the other tenants in common parties to this suit. Their rights are not questioned. The judgment is reversed, and there must be a new trial, with costs to abide the event.

ROBERT L. NOYES v. JOHN ANDERSON.

The defendant was the owner in fee of premises at the foot of Barclay street, in the city of New York, in which was an office known as "The Troy Day Boat Office," and which had then been standing there for the period of twenty years." On the 1st of May, 1850, he leased the office to one Ross, for one year, for \$500, payable monthly in advance. Ross went into possession and occupied until the 1st of September, 1850, when the plaintiff was accepted by the defendant as his tenant, from that date to the 15th of November then next, on condition of his punctually paying rent as stipulated to be paid by Ross. On the 3d of September, 1850, the plaintiff, as such substituted tenant, paid to, and the defendant received, \$41 62, in full of the rent for the month of September, in advance. On the morning of the 7th of September, 1850, the office was torn down by the Street Inspector of the city, under the authority claimed to be derived from 2 R. L. p. 484, § 220, and p. 484 id. §. 227, and a corporation ordinance, found at page 288, § 1, of the edition of 1845. The plaintiff brought this action, claiming to receive so much of the rent paid in advance, as would be payable for the part of the month of which he had been deprived of the occupation, and also the value of his bargain, or the difference between the value of the lease and the rent stipulated to be paid. The lease contained no covenant, and there was no fraud or misrepresentation on the part of the defendant. It was held, that if the destruction of the office was unauthorized by law, that act was a trespass, and would not exonerate the plaintiff from his liability to pay the stipulated rent. If authorized by law, the existence of the authority, and the probability of its being exercised, were presumptively as well known to the one as the other.

That the recovery must be limited to so much of the advance rent as was proportioned to the part of the month, during which the plaintiff was deprived of the use and occupation of the office. The recovery of this much was allowed on the principle that to this extent there had been a failure of con-

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sideration, the lease having been given and taken in the mutual expectation that the plaintiff would not be disturbed in the enjoyment of the premises by any action of the corporation during the term.

That in the case of an eviction from demised premises, where there was no fraud or misrepresentation of the lessee inducing the taking of the lease, the measure of damages, if rent has been paid in advance, is so much of the advanced moneys as would be payable at the stipulated rate, for the unexpired part of the lease, with interest, and that if no rent had been paid in advance no damages could be recovered by the lessee. His liability to pay rent would cease from the time of the eviction.

Upon an executory contract to give a lease, and a failure or refusal to give one, the rule of damages is the same, if the inability or refusal is without any fault or fraud on the part of the party promising to execute it.

Where the refusal to give a lease results from the fraudulent conduct of the defendant, consequent special damages, on proper allegations being embodied in the complaint, may be recovered.

(Before OAKLEY, Ch. J., PAINE and BOSWORTH, J.J.)

Argued November 8: December 11, 1852.

THIS was an action to recover damages for the eviction of the plaintiff, by a paramount title, from certain premises leased to him by the defendant. The cause was tried before Ch. J. Oakley, and a jury, on the 9th of May, 1852. A verdict was rendered for the sum of \$159 51, the damages claimed by plaintiff, subject to the opinion of the court at general term.

The following are the material facts as they appeared in evidence on the trial:—

The defendant, Anderson, on May 1st, 1850, rented "The Troy Day Boat Office" (a tenement standing on the pier below the foot of Barclay street) to John J. Ross, for one year, at the rent of \$500. Ross entered and occupied, till about September first, paying rent. On the third September, Ross assigned lease and premises to plaintiff, Noyes, till November 15th, over two months. Defendant, Anderson, then received plaintiff, Noyes, in place of Ross, for said period, and plaintiff paid him \$41 66 in full of the first month, in advance. Plaintiff, Noyes, then sub-let the office to Weldon, for the period of his lease, to the 15th November, for \$20 a week, payable weekly in advance. On the 7th day of said September the superintendent of streets, having caused the proper notice to be put up on the building, tore it down and carted it to the public yard, evicting Weldon.

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L. Marsh, for the plaintiff, relied upon the following points and authorities:—

I. The tenement thus rented by the defendant to the plaintiff, was on the pier, in violation of law; it had no right there, and the defendant rented the building wrongfully.

Laws of 1813, 2d vol. p. 434, section 227, enacts, "That no building of any kind or description whatsoever, other than the said piers and bridges, shall at any time hereafter be erected upon the said streets or wharves, or between them respectively and the river to which they respectively shall front and adjoin."

The streets in the above section referred to are West and South streets.—*Vide* p. 432, sec. 220.

Sess. L., 1815, p. 157. *Vide* laws relating to city of New York, p. 249. The only modification of this law, which has since been made, is in permitting the erection of ferry houses on the wharves or streets.

This Troy Day Boat office was on the pier below Barclay street, between West street and the North River, and it was not a ferry house.

It was there, therefore, contrary to the statute.

II. The city of New York caused this office to be removed, according to law.

Corporation Ordinances, revised edition of 1845, p. 288, sec. 1.—The Street Commissioner, &c., may order anything whatsoever, which may encumber or obstruct any street, wharf, or pier, to be removed. If not removed within twenty-four hours after notice to remove, he may order it to be carted or removed to the yard of the Superintendent of Buildings, or other suitable place.

P. 289, sec. 6, gives same power to other officers.

These ordinances were complied with in the removal of this office.

III. It was contended on the trial, that there is, by statute, no implied covenant for quiet enjoyment. We answer:—

1. We did not bring our action on any such implied covenant; and, therefore, to deny the existence of such covenant, is to deny nothing material.

2. The statute relied on is, "No covenant shall be implied in

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any conveyance of real estate, whether such conveyance contain special covenants or not.”—2 R. S., 3d ed., p. 221, sec. 140.

This is under the title of “Alienation by Deed.”

The memorandum signed by defendant, agreeing to take plaintiff for two months, in lieu of Ross, was no “alienation by deed;” no “conveyance;” nor is it, in any sense, within the meaning of said 140th section.

The subject of the action is not real estate within the meaning of said section.

This term, real estate, as here used, is subsequently defined :

“The term, ‘real estate,’ as used in this chapter, shall be construed as co-extensive in meaning with ‘lands, tenements, and hereditaments,’ and as embracing all chattels real, except leases for a term not exceeding three years.”—2 R. S., 3d ed., p. 46, sec. 42.

Of course, a lease for a term not exceeding three years, is not “real estate.”

This lease, then, for two months, is not “real estate;” nor is the lease a “conveyance.”

So, also, the term “conveyance” is defined, and “leases for a term not exceeding three years” are expressly excluded from the definition.—2 R. S., 3d ed., p. 47, sec. 44.

IV. It was contended on the trial, that Ross, in his memorandum of lease, had agreed to do whatever repairs he might want, at his own cost and expense.

If this applied to the plaintiff, Noyes, it would not bind him to rebuild.

To repair is not to reconstruct. To do what repairs he may want, does not impose on him the obligation to put up a new building, in violation of law.

V. That the defendant was the owner of the pier, does not change the case. The statute applies as well to owners as to lessees, or other occupants.

VI. It was said, the plaintiff should have known the law, as well as the defendant.

The defendant, Anderson, knew whether he had violated the law or not. The plaintiff, Noyes, could not know it. He could not know whether the building was erected before the law, or whether defendant had obtained permission from the city.

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Indeed, if both contracted in ignorance of the law, the defendant is liable for the consequences of his contract. He pretended to have a right to lease the office, when no such right existed.

VII. It may be urged that defendant had acquired the right by the long standing of his building, a sort of adverse possession.

Presumptions from long acquiescence arise between individuals, but not against a statute. This is not an acknowledged way of repealing a law. This building was put up contrary to the statute, it stayed there contrary to statute, and it was pulled down according to statute.

The argument is, that a man may violate the law so long that he claims to have a right to do so. That is, the defendant claims under a legal prescription to disregard the law.

VIII. The damages were correctly estimated by the jury. They were :—

1. The amount actually paid defendant by plaintiff; and
2. The difference between what plaintiff had agreed to pay defendant, and what plaintiff had rented it to Weldon for. This was no fancied benefit. It was the actual worth of the contract.

But the defendant contended we were entitled to only nominal damages.

Such might be the rule in a technical action, on a covenant for quiet enjoyment, where no purchase money had been paid. But here \$41 66 had been paid, and this action was not on the implied covenant.

This was an action corresponding with the old action of trespass on the case.

14 Wendell, 41, *Kinney v. Watts*.—SUTHERLAND, J. “The appropriate action for the injury complained of by the plaintiff, would have been a special action on the case, in which the question of damages is entirely at large, embracing all the loss and injury, which is the necessary result of the illegal acts complained of, if the declaration is properly framed.”

17 Wend. 71, *Driggs v. Dwight*.—Action on agreement to lease. Defendant contended that the plaintiff was only entitled to recover the difference between the actual value of the rent, and the sum he had agreed to pay as rent.

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The judge charged: Plaintiff is entitled to the damages necessarily resulting from breach of contract, and expenses of removing family, &c., was a proper item.

Cowen, J., says: "The Jury might look to the actual value of the bargain the plaintiff had made."

But the concession of the defendant in the case cited, would justify the recovery in the case at bar; for the actual value of the rent was what Weldon had agreed to give.

4 Barb. Sup. Ct. R. 261, *Giles v. O'Toole*.—"In an action by a lessee against a lessor, to recover damages for a refusal to give possession of the demised premises, the plaintiff may recover the damages arising from the expenses incurred in preparing to remove and occupy the premises, together with the difference between the real value of the rent and the sum agreed to be paid."

All we recovered here was the money we actually paid defendant, and, in addition, the difference between the real value of the rent (which was what Weldon agreed to pay us) and the sum plaintiff agreed to pay defendant.

W. W. Niles, contra, insisted on the following points:—

I. There is no warranty of title or covenant for quiet enjoyment or to repair—then the plaintiff must show affirmatively that the Corporation of New York, and not the defendant, were owners, or entitled to the privileges claimed by them.

II. Notwithstanding the statute and ordinance relied on by the plaintiff, twenty years' peaceable possession is *prima facie* evidence of permission from the City to build the "Steam Boat Office," and it being admitted that the defendant owned the fee of the premises, the right to occupy for a steamboat office became vested and absolute.

At least the plaintiff must show affirmatively that the defendant had no right and no permission.

III. Ross was as much bound as Anderson to know the public law, if this is considered one, under which the Corporation claimed—and to know the extent of their claim. If so, he took subject to it, there being no covenant in the lease—in which

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case it is submitted a party only lets his interest. (*Lyons v. Richmond*, 2 John Ch. 51, 60.)

IV. "The court cannot judicially notice the ordinances of a Municipal Corporation." If the plaintiff claims that the city acted under one, it should appear, or be referred to in the case. He must aver and prove his title paramount, and that he was evicted under it. (*Kelly v. Dutch Church, &c.*, 2 Hill, p. 111. *Webb & Wife v. Alexander*, 7 Wend. p. 281.)

V. There is no pretence but that the plaintiff was permitted to occupy the premises, he merely alleges damage by the destruction of the improvements. It was not in any event a total eviction.

VI. An eviction, if proved, only discharged the rent.

VII. Only particular words such as "demise" or "grant," imply a covenant for quiet enjoyment. (*Frost v. Raymond*, 2 Caius, 188. Platt on Covenants, Law Library, vol. iii. p. 40.)

VIII. If the plaintiff can recover at all, the measure of damages is the consideration money paid and interest, or, in the present case, the rent paid in advance less the proportion from 1st to 7th September, the time plaintiff was in possession. (*Kinney v. Watts*, 14 Wend. p. 38. *Dimmick v. Lockwood & Or.*, 10 Wend. p. 142. *Kelly v. Dutch Church, &c.*, 2 Hill, p. 105. *N. Y. & H. R. R. Co. v. Story*, 6 Barb. 419. *Peters v. McKeon*, 4 Denio, 546.)

IX. In any event the verdict as recorded is excessive. The plaintiff has a verdict for the whole amount Weldon promised to pay—then for one particular week which he refused to pay, and then for the whole amount he had paid defendant, although he occupied from 1st to 7th September, nearly one fourth of the whole time.

BY THE COURT. BOSWORTH, J.—On the 1st of May, 1850, the defendant rented to Ross the office at the foot of Barclay street, for one year from that date, for \$500, payable monthly in advance. The office is known as "The Troy Day-Boat Office." The instrument in writing, or lease, signed by the defendant, contained no promise on his part of any kind whatever. He "owned the property (leased) in fee simple."

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Ross went into possession, and occupied until the 1st of September, when Noyes went into possession. On the 3d of September, Noyes paid to the defendant \$41 66, for one month's rent of the office in advance, from the 1st of September to the 1st of October. Anderson signed a written agreement, dated September 3, 1851, and delivered it to Noyes, whereby, as stated therein, "in consideration of the punctual and prompt payment of the rent as stipulated to be paid by Ross, he consented to receive Noyes as a tenant in the place of Ross, from the 1st of September to the 15th of November following."

The office was torn down on the morning of the 7th of September by the street inspector.

The appeal presents substantially but two questions:

First, Is the plaintiff entitled, upon all the facts and circumstances of this case, to recover anything?

Second, If entitled to recover, what is the rule by which the damages are to be ascertained?

If an action will lie on the facts of this case, it must be for the reason that the plaintiff has paid money upon a consideration which has failed, and which in equity should be refunded. There is no attempt to prove any fraudulent misrepresentation, or concealment of any material fact. It is conceded that the defendant owned the fee of the premises on which the office stood. He had therefore all the right to grant the lease in question which any owner in fee of such property possesses.

It was unlawful, or so the plaintiff insists, to erect and continue this office on the pier on which it stood. 2 R. L. p. 432, § 220, and p. 434, 227, are cited as legislative prohibitions against such erections.

Assuming that this act divested the owner of the pier of all right to erect or continue such a structure on the pier, this fact was presumptively as well known to Noyes as to the defendant. It is declared to be a public act (*id.* p. 660, § 315), and every citizen is presumed to know the law. There is nothing in the case to show that its existence and particular provisions were not as fully known to the one party as to the other. If the effect of this statute be such as the plaintiff's counsel contends, then it was in the power of the city to tear down the building, if not removed within twenty-four hours after a notice to re-

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move it had been given by the street commissioner. (Cor. Ord. edition of 1845, p. 288, § 1.)

The destruction or removal of the building, as both parties must be presumed to have known, when Noyes became a tenant of the defendant, and paid one month's rent in advance, was liable to occur at any time on twenty-four hours' notice. It appears, however, to have been standing, and to have been used for the period of twenty years. To this, so far as the evidence shows, no objection had been made by the municipal officers of the city.

We think it a just conclusion, that both parties contracted, the one to rent, and the other to hire and pay monthly in advance, on the mutual understanding and expectation that the plaintiff would not be disturbed in the enjoyment of the premises by any action of the city corporation. That this was the understanding and expectation of the defendant and Ross, is shown by the fact that the former leased and the latter hired the premises for a year, which did not expire until the first of May subsequent to the time of pulling down the office. The consideration of the payment by the plaintiff on the third of September of \$41 66 was the enjoyment to be had of the premises for the whole of that month. This consideration failed as to twenty-four days of the time for which it was paid, without the fault of either party, and contrary to the understanding of both. And we think it just and equitable that the plaintiff should at all events recover back the rent for so much of the month as he was deprived of the enjoyment of the premises.

There is nothing tending to show that the tenant, on hiring the office, and paying a month's rent in advance, was understood by both parties to take the risk of the office being permitted to remain during the term. Unless this was so, there has been a partial failure of the consideration for which the rent was paid and received.

To the amount of such failure the recovery must be limited.

If the lease had contained covenants of seizin and for quiet enjoyment, and the plaintiff had been evicted by a paramount title, the whole amount which he could have recovered back, in an action upon any of the covenants, would be the moneys paid in advance, deducting therefrom rent at the stipulated

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rate for such portion of time, for which the advance payment was made, as the lessee had enjoyed the premises, with interest on such balance.

It is regarded as settled law in this state that the ultimate extent of a grantor's responsibility, under any or all of the usual covenants in his deed, is the purchase money with interest. (4 Kent Com. 476, 477; 5 J. R. 49; 12 *id.* 126; 10 Wend. 142.)

In *Kelly v. Dutch Church of Schenectady* (2 Hill, 116), the same rule was applied to an eviction from demised premises. The court said: "Following that analogy, the rents reserved in a lease, where no other consideration is paid, must be regarded as a just equivalent for the use of the demised premises. The parties have agreed to so consider it. In case of eviction, the rent ceases, and the lessee is relieved from a burden which must be deemed equal to the benefit he would have derived from the continued enjoyment of the property. Having lost nothing, he can recover no damages." (14 Wend. 41, *Kinney v. Watts.*)

In this case, there is no covenant or promise for the quiet enjoyment of the premises by the lessee. There is no fraud on the part of the lessee, and the plaintiff has not been disturbed in his possession by any wrongful act of the lessor. On such a state of facts, it is not perceived on what principle the liability of the defendant is any greater than it would have been if he had expressly covenanted that the plaintiff should not be disturbed during the period of his stipulated tenancy.

He accepted the plaintiff as his tenant for two months and a half. Each party knew at the time, or is presumed to have known, that the office might lawfully be destroyed by public authority at any time after twenty-four hours' notice. It was so destroyed during the plaintiff's tenancy. At least, this assumption is the only one on which his right rests to recover anything. For if the destruction of the office was not authorized by law, but was the act of a trespasser, the plaintiff has not only no right of action, but is liable to pay rent for the residue of his term. The plaintiff's counsel contended that the plaintiff was entitled to recover the value of his bargain, and also to recover back the rent for the period of the month which

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he had paid in advance, and during which he was deprived of the possession. The case of *Driggs v. Dwight*, 17 Wend. 71, and *Giles v. O'Toole*, were cited in support of this proposition. The former case was an action upon an executory contract to give a lease. *Kinney v. Watts*, does not appear to have been cited by counsel on the argument, nor to have been adverted to by the court in its opinion. On the trial, the defendant's counsel conceded that the plaintiff was entitled to recover the difference between the actual value of the rent, and the sum he had agreed to pay as rent (p. 73). The plaintiff was also allowed to recover the expenses of removing from his residence to the demised premises, although no such damage was alleged in his declaration. There are several cases which recognise the right of a person who has contracted for a lease to recover such damages when they are averred in the declaration, and the refusal of the defendant to give a lease does not result from his inability, without fault on his part, but from his fraudulent or perverse refusal. There was no other ground for the refusal in *Driggs v. Dwight*. *Giles v. O'Toole*, 4 Barb. S. C. R. 261, and *Lawrence v. Wardwell*, 6 id. 423, were actions to recover damages in consequence of the refusal of the defendants, the lessors, to give possession of the demised premises, according to the terms of the lease.. It was in their power to have given the possession, and their refusal to do so was without any excuse which the court could approve.

It was decided in the supreme court of this state, in 1829, that a *bonâ fide* vendor, who covenants to sell and convey land believing he has a good title, but who on discovering before any part of the consideration money has been paid that he has no title, is not liable to any damages for refusing to convey (*Baldwin v. Munn*, 2 Wend. 399).

The same court, in 1847, in *Peters v. McKeon*, 4 Denio 546, re-adjudged the same point, and also held that in such a case, the plaintiff could not recover for his expenses of removing upon the premises, nor for any improvements which he had made upon them.

The measure of damages in such a case was held to be substantially the same as it is in the case of an eviction, after entering into possession under an executed sale.

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Both of these cases recognise the rule, that where a party contracting to give a lease, or to convey, has the power to perform his contract, but perversely refuses, his refusal becomes fraudulent, and the other party may recover the value of his bargain, and any special damage actually resulting from the violation of the contract.

Retner v. Braugh, 11 Penn. R. 127, holds the same doctrine, and distinguishes between the cases where the conduct of the lessor or grantor is *bond fide*, and those in which it is fraudulent.

Where it is fraudulent, the defrauded party, in an action on the case founded on fraud, may recover the value of his bargain, and any special damage, which in judgment of law has resulted from the fraud.

In this case, there is no fraud on the part of the defendant, nor any express promise that the plaintiff should have quiet enjoyment of the premises to the 15th of November.

I do not think there is anything in the terms of the paper or lease given to Ross, or in that given to the plaintiff, from which such a promise of the defendant can be implied by law. But if there was an express promise for quiet enjoyment, as the case is free from fraud, the plaintiff could only recover back so much of the rent advanced as was paid for the twenty-four days in September, during which he was deprived of the possession, and interest from the 7th of that month.

The rent for twenty-four days, at \$41 66 for the month, is \$33 33.

The verdict must be set aside, and a judgment entered in favor of the plaintiff for \$33 33, and interest from September 7, 1850.

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LEWIS FATMAN and others v. WILLIAM LOBACH and another.

A person who in good faith advances money to the holder of a certificate of stock to which a power of attorney is annexed, which is expressed to be for value received, and on its face is irrevocable, although the power is in blank as to the name of the attorney, acquires by the delivery to him as collateral security of the certificate and power, a valid title against the person by whom the power was executed, and in whose name the stock is standing.

The lender in such a case has the right to believe that the holder of the certificate and power is the owner of the stock, and has an absolute right to hypothecate as well as to sell it.

He is therefore not bound to surrender the certificate and power to the original owner of the stock, unless upon the repayment with interest of his whole advance, although such owner may have satisfied the debt for which he had himself pledged the stock.

Held, upon these grounds, that the defendants were entitled to judgment.

(Before OAKLEY, Ch. J., and BOSWORTH, J.)

Nov. 10th; Dec. 11th, 1851.

THIS was an action to compel the return and delivery to the plaintiff of certain certificates of stock, or in default thereof, the payment by the defendants, as the value of the stock, of \$15 25, with interest.

The cause was tried before Mr. Justice CAMPBELL, and a jury, on the 21st of June, 1852. In order that the application of the evidence given on the trial may be properly understood, it will be necessary to state the substance of the pleadings.

The complaint stated that the plaintiffs were partners under the name and firm of S. Fatman & Co., and on or about the 16th of August, 1851, were the owners of ten shares of the capital stock of the Columbia Insurance Company, a corporation under the laws of Pennsylvania, worth the sum of \$400; of twenty-five shares of the Astor Insurance Company, a corporation under the laws of New York, worth the sum of \$625, and of scrip of the Atlantic Insurance Company, also a New York Corporation, for and worth the sum of \$500, for the first two of which stocks they held a certificate in their own names; for the third a certificate in the name of Joseph Fatman, trustee. That on the day above-named, they borrowed, of one F. Esenwein,

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the sum of \$3000, and as a security for the repayment of the loan with interest, transferred to him a promissory note of R. H. Arkenburgh, dated the 12th of May, 1851, payable four months after date, for \$1,620 $\frac{2}{3}$, another promissory note of C. R. Donaldson, dated May 10th, 1851, payable four months after date, for \$686 $\frac{1}{3}$, and also delivered to him, the said Esenwein, the certificates of stock above-mentioned, with power of attorney to transfer the same, such power being in blank as to the names of the attorney and of the transferee; that the said Esenwein, without notice to the plaintiffs, and without demanding of them repayment of the said loan, on or about the same day, handed over the said certificates, power of attorney, and promissory notes to the defendants, partners, under the firm of Lobach & Schepeler, as security, it was alleged, for a loan made by them to the said Esenwein.

The complaint further alleged, that as soon as the plaintiffs heard of the transaction between Esenwein and the defendants, they tendered to the latter the sum of \$3000, and demanded from them a return of the said notes, certificates, and powers, with which demand the defendants refused to comply.

The complaint further stated, that the said promissory notes had been duly paid at their maturity, and said that after such payment, the plaintiff duly tendered to the defendants the sum of \$715 $\frac{2}{3}$, being the balance with interest, due from them, on their loan of \$3000, but that the defendants had refused to accept the tender and deliver up the certificates. The plaintiffs therefore demanded judgment—that the defendants, on the payment to them of \$715 $\frac{2}{3}$, should be adjudged to return to the plaintiffs the said certificates, and to deliver up the said powers of attorney to be cancelled, or in default thereof, to pay to the plaintiffs the value of the certificates, being the sum of \$1,525, with interest.

The defence set up in the answer was, that the defendants, on or about the 15th of August, 1851, lent and advanced to Esenwein the sum of \$5000, upon the pledge and hypothecation by him of the shares of stock mentioned in the complaint, and upon the further security of the following promissory notes, one paid by R. H. Arkenburgh, due 15th September, 1851, for \$1620 $\frac{2}{3}$, another made by one Charles

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R. Donaldson, due 13th September, 1851, for \$686 $\frac{1}{4}$, both of which were endorsed by plaintiffs, and a third, made by one Henry C. Stevenson, due 12th December, 1851, for \$1,661 $\frac{1}{4}$. That in consideration of such loan, and to secure its repayment, the said F. Esenwein, by his duly authorized attorney, Charles Esenwein, simultaneously therewith, executed and delivered to the defendants the following promissory note, commonly called a stock note.

\$5,000.

New York, August 16, 1851.

On demand, I promise to pay to Messrs. William Lobach & Schepeler or order five thousand dollars for value received, with interest at the rate of 7 per cent. per annum, having deposited with them as collateral security (with authority to sell the same on the performance of this promise) \$1525 in three insurance stocks and 3968.28 8 notes.

FREDERICK ESENWEIN,
per CHAS. ESENWEIN.

And at the same time delivered to the defendants the certificates of stock mentioned in the complaint, and also separate powers of attorney to transfer the same, two of which were duly executed by the plaintiffs, and the third by Joseph Fatman, trustee. The answer set forth the powers, each of which was in the following form :

Know all men by these presents, that we, the undersigned, *for value received, do hereby irrevocably constitute and appoint* to be our true and lawful attorney, for and in our name and behalf, to sell, assign, and transfer unto *or any other persons or persons*, twenty-five shares in the capital stock of the Astor Fire Insurance Company. *And further, one or more persons under us to substitute with like power.*

In witness whereof, we have hereunto set our hand and seal, this 14th day of August, 1851.

LEWIS FATMAN & Co.

Sealed and delivered in the }
presence of }

The answer then alleged that these powers had been filled

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up with the names of the defendants, as attorneys and transferees, and transfers demanded on the books of the said companies before any tender was made to them by the plaintiff. It then proceeded, as follows:—

“And the said defendants further show, that such stock assignments or powers to transfer stocks, are and were at the time hereinbefore mentioned, by usage and custom within this state, negotiable instruments, vesting the bearer or holder thereof for the time being with the title and ownership of the stocks and scrip which they represent, and authorizing such bearers or holders thereof to fill up the blanks therein with the names of such transferees of the said stocks, and of scrip, and of such attorney to transfer the same as they might elect, that the said defendants advanced the said sum of five thousand dollars upon the pledge and hypothecation of the said stocks and scrip in good faith, in the ordinary course of business, and without any notice that the said Frederick Esenwein was not the full and absolute owner thereof, for a valuable consideration.

“And the said defendants further say, that the whole amount of the said loan so made by them to the said Frederick Esenwein still remains, and is due and unpaid, with the exception of the amounts of the said two promissory notes of R. H. Arkenburgh and Charles R. Donaldson, which have been paid, leaving due and unpaid to the said defendants a balance of the said loan, amounting to the sum of twenty-six hundred and ninety-two $1\frac{1}{2}$ dollars, besides interest, for which amount and interest the said defendants are advised and respectively insist that they have a lien upon the said stocks and scrips, and a right to sell and transfer the same, and apply the proceeds to the payment of the balance due on the said loan, with interest and charges.”

The reply took issue upon the material allegations in the answer.

Upon the trial the following facts were admitted by the respective parties:—

“That on the sixteenth day of August, one thousand eight hundred and fifty-one, the plaintiffs borrowed of one F. Esenwein the sum of three thousand dollars, and as collateral secu-

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rity therefor, delivered to Esenwein the certificates of stock and the scrip, with the blank powers of attorney, and note of R. A. Arkenburgh, for one thousand six hundred and twenty dollars and twenty-four cents, and of C. R. Donaldson for six hundred and eighty-six dollars and eighty-eight cents, all described in the complaint; and that, on the same day, Esenwein, adding to these securities the note of Stephenson, described in the pleadings, borrowed from the defendants the sum of five thousand dollars, for which he gave them his own note for five thousand dollars, as mentioned in the pleadings, and as collateral thereto, handed over said securities and note to the defendants, with the stock certificates, and scrip, and powers of attorney for the transfer of said stock and scrip, the same being still in blank. It was also admitted by defendants' counsel that the Stephenson note was not paid. It was also admitted by said counsel that the said stock and scrip were not transferred by the companies to Esenwein, and also, that the blank powers were not filled up to him, but that said blank powers were filled up by the defendants with their own names as the transferees and attorneys to transfer, *after the first demand had been made upon them* by Joseph Fatman, and the said powers presented to the said companies with the certificate and scrip, and transfers demanded in pursuance thereof, which the companies refused, such transfers having been forbidden by the plaintiffs."

The value of the stock was admitted to be \$1,525, subject to adjustment. It was also admitted that F. Esenwein was insolvent to a large amount. Several witnesses were then examined on the part of the defendants to prove the usage set up in the answer. Their testimony was objected to by the counsel for the plaintiffs, and as it was disregarded in the opinion of the court, it is unnecessary to be stated.

The evidence was then closed, and, under a charge of the court, the jury found *a verdict for the plaintiffs for the full amount claimed* and interest, subject, however, to the opinion of the court at general term, on a case to be made, with liberty to turn same into a bill of exceptions, and subject to adjustment as to amount, with liberty to the court to order a nonsuit or judgment for defendants, the case to be heard in the first instance at a general term.

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E. S. Van Winkle, for plaintiffs, insisted that they were entitled to judgment upon the verdict, upon the following grounds:

I. The delivery of the powers in blank to Esenwein, can only be held to be an implied authority to him to fill up the blanks therein, when it was rightful and proper for him to do so—that is, upon the plaintiffs' failure to repay their loan; but that exigency never having arisen, Esenwein never had any rightful authority, express or implied, to fill the blank. (*Ex parte Decker*, 6 Cowen, 60.)

II. But whatever implied authority rested in Esenwein to fill in the blanks in the executed powers, none such was ever vested in the defendants.

III. The certificates were not negotiable, and did not pass by delivery; and there was no power ever given, even to Esenwein, to pledge or hypothecate the stocks, but merely to sell, assign, and transfer them. (2 Kent's Commentaries, 579; 4 Kent's Commentaries, 138; *Allen v. Dykers*, 7 Hill's Rep. 501; *Poley*² *Daley on Agency*, 213, 218; *De Bouchout v. Goldsmid*, 5 Ves. p. 211.)

IV. The courts will not complete a defective security, except to carry out the purposes of the instrument.

V. No usage or custom can control a rule of law. (*Thompson v. Ashton*, 14 Johns. Rep. 316; *Hinton v. Locke*, 5 Hill, 437; *Allen v. Dykers*, 3 Hill, 593, *affd.* 7 Hill, 497.)

VI. Judgment should be for the plaintiffs according to the prayer of the complaint, either that the defendants return the securities and cancel the powers, or pay plaintiffs the value thereof as fixed by the verdict.

J. Larocque, contra.

The powers to transfer in this case are powers coupled with an interest. They express a valuable consideration on their face. A valuable consideration was in fact given for them. They are irrevocable by their express terms, and contain the fullest possible power of substitution. Independently, therefore, of any consideration of custom or usage, in regard to the mode of transferring and passing the title to stocks, the defendants acquired a good title by the pledge of the securities and transfer of the

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certificates and powers of attorney to them, to the full extent of the \$5,000 advanced upon such pledge and interest. 1. The words "value received," in the powers to transfer, by fair construction, mean that the plaintiffs had received full value for the stocks from the person to whom the certificates and powers were originally given, and that inference the defendants were justified in drawing from the language used. 2. The powers to transfer being irrevocable on their face, and containing an unlimited power of substitution, vested in Esenwein an absolute control over the stocks, and would entitle the defendants, in any event, to hold the stocks as the substituted attorneys of the plaintiffs, under the power of substitution, and as security for the repayment of their value, the receipt of which by the plaintiffs from the original agent, the power acknowledged on its face, and which the defendants were accordingly justified in repaying to the agent on being substituted. (Story on Agency, § 476-7: *Hunt v. Rousmaniere*, 2 Mason, 244; *Hancock v. Byrne*, 5 Dana, 514; Angell and Ames on Corporations, 2d ed. p. 445; *Gilbert v. The Manchester Iron Manufacturing Co.*, 11 Wend. 627.) The rule of law, that where one of two innocent parties is to suffer by the act of an agent, he who appointed the agent, and put it in his power to defraud, should be the loser, applies in the full force, in this case, against the plaintiffs and in favor of the defendants. (*North River Bank v. Aymar*, 3 Hill, 268, and cases cited.) The testimony as to custom and usage, in the transfer of stocks, offered by the defendants, was properly admitted, stands entirely uncontradicted, and is conclusive upon the rights of the parties in this case. (*Commercial Bank of Buffalo v. Kortright*, in Court of Errors, 22 Wend. 348; same case in Supreme Court, 20 Wend. 91.) This being not an action of trover, but the plaintiffs having chosen to appeal to the equitable powers of the court to compel the return of the certificates to them, and the cancellation of the powers to transfer, the rule that he who seeks equity must do equity, is fairly applicable; and the rule of equity in this case is, the repayment of the whole balance of the five thousand dollar loan and interest. There should, therefore, be judgment for the defendants with costs.

BY THE COURT. OAKLEY, CH. J.—The question is, whether

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the defendants, having advanced their money in good faith to Esenwein, upon the pledge of the stocks, are entitled to retain them, until the balance still due to them shall be satisfied, and we are clearly of opinion that they are so entitled, both in law and in equity.

As each certificate was accompanied by a power of attorney which was expressed to be given for value received, and, on its face, was irrevocable, the defendants were fully justified in believing that Esenwein was the equitable owner of the shares, and had a perfect right to make an absolute or conditional transfer, to sell, or hypothecate them. Such a certificate annexed to or accompanying a blank power of attorney, we cannot doubt, not only according to the understanding of men in business, but upon well settled principles of law, passes by delivery an equitable title to a *bona fide* purchaser; nor can such purchaser be justly prevented from converting his equitable into a legal title, by filling up and exercising the power, whenever he is entitled to do so by the nature or terms of the contract under which the certificates were delivered to him. Where the stock is sold absolutely, his right thus to perfect his title is immediate; where it is hypothecated, the right accrues when the debt meant to be secured becomes due and remains unpaid. Whether in the present case the powers of attorney were filled up before the plaintiffs made their tender, and demanded a return of the certificates, is, in our judgment, wholly immaterial. No tender short of the whole debt due to the defendants, could deprive them of their right to use the powers for the purpose for which they received them.

It was admitted by the counsel for the plaintiffs, that had the stocks been sold absolutely to the defendants, their title to retain them could not be questioned, but we cannot admit the distinction between a sale and a pledge which the counsel urged us to adopt. As the certificates and powers in the hands of Esenwein were presumptive evidence of his ownership, he had the same apparent right and authority to hypothecate the stocks, as to sell them.

There is no rule of law of which the equity is more manifest, or which is better sustained by reasons of public policy, than that which casts a loss, resulting from the fraud of a third per-

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son, upon the party who by employing and trusting such person enabled him to commit it (*White v. Springfield Bank*, 3 Sandford, 229, and cases there cited). And we doubt whether a case is to be found in the books to which it is more evident that the rule ought to be applied. Had the plaintiffs placed their notes and certificates, with an ordinary power of transfer, in the hands of Esenwein merely as their agent, and broker, with instructions to procure upon them, in his own name, but upon their account, a loan of \$5,000; and had Esenwein, after obtaining such a loan from the defendants, converted the whole sum to his own use, it cannot for a moment be doubted, that a loss resulting from his subsequent flight or insolvency, must have been borne wholly by the plaintiffs. It will not be pretended that in such a case they could have claimed a return of the stocks, upon any other terms than the full payment of the debt for which they were pledged. The case before us not only rests upon the same principle, but is far stronger in its circumstances. Here Esenwein was not a mere agent, but a holder for value. The papers placed in his hands were evidence, not only of his authority, but of his ownership, and the plaintiffs have received from him \$3,000 of the \$5,000 which the defendants advanced. It is with far less reason therefore that the plaintiffs can apply to a court of justice, to be relieved, at the expense of the defendants, from the consequences of the fraud, which, by their misplaced confidence, they enabled Esenwein to commit.

As we do not found our decision at all upon the usage that was proved upon the trial, it is unnecessary to say whether in our opinion the evidence was properly admitted. It may be considered as stricken from the case.

The verdict for the plaintiff must be set aside, and a verdict and judgment thereon, with costs, be entered for the defendants.

Lawrence v. Kemp.

LAWRENCE v. KEMP.

Gas fixtures and sitting stools, when placed by a tenant in a shop or store, although fastened to the building, are not fixtures, as between the tenant and landlord.

They are the property of the tenant, and may be removed by him not only during the term but after its expiration. He may pass a title to them by a chattel mortgage, and they may be levied on under an execution against him as his personal property.

When a subsequent tenant in possession of a store containing such articles, the property of a former tenant, is sued by the landlord for not delivering them to him at the expiration of his term, he may defend himself by showing that they had been mortgaged by the first tenant, and that the mortgagee had entered and removed them.

Even when such subsequent tenant had bound himself by an agreement in writing to deliver the articles to the landlord at the expiration of his term, he is liable only for nominal damages, when he proves a paramount title in the mortgagee by whom they were removed.

Held, that the judge upon the trial erred in excluding such a defence, and a new trial therefore granted.

(Before OAKLEY, Ch. J., PAINE and BOSWORTH, J. J.)

Nov. 11; Dec. 11, 1852.

APPEAL by the defendant from a judgment at special term, on a bill of exceptions.

The complaint alleged that the plaintiff, on or about the 7th of June, 1850, let to the defendant a certain store known as No. 379 Broadway, with the fixtures therein, until the 1st day of July following, and that the defendant agreed to deliver up said store with all the fixtures therein to the plaintiff, at the expiration of his term—that the defendant's term had expired, and that he had not complied with his agreement by delivering up the store with the fixtures, but, on the contrary, in violation of his agreement, had removed therefrom certain of said fixtures, to wit, gas fixtures of the value of \$200, and seventy stools of the value of \$210, or \$3 each. The plaintiff therefore claimed damages to the amount of \$410, and demanded judgment for that sum, with interest, from the 5th of July, 1850.

The defence set up in the answer was, that the articles mentioned in the complaint belonged, on the 25th of May, 1850, to

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George Stewart and James W. Patterson, and on that day, by a mortgage duly entered and filed, were mortgaged by them to one Harvey A. Newcomb, who before the first day of July took and received the said articles by virtue of his mortgage. It also averred that these articles were not fixtures within the true intent and meaning of the contract between the plaintiff and defendant. The reply took issue on all the material allegations in the answer, and averred that the defendant, by the terms of his agreement, was estopped from denying the plaintiff's title.

The cause was tried before Mr. Justice Paine and a jury on the 6th of April, 1852.

Upon the trial the counsel for the plaintiff gave in evidence the following written agreement and receipt, the execution of which was admitted.

“Received, New York, June 7, 1850, from R. C. Kemp, four hundred dollars, for the rent, till the 1st day of July, of the store lately occupied by George Stewart, at the corner of Broadway and White street, with the fixtures therein. It is understood that I am to have possession of the said store on my giving three days' notice, at any time before the said first day of July, 1850, in which I am to refund to the said Kemp so much of the above sum as may be equal to \$11, $\frac{1}{10}$ for every day that may be unexpired at the time of the delivery to me of possession on the first day of July, and that the store is to be delivered with all the fixtures which are now therein, unless taken out by process of law, of which Mr. Kemp agrees to give me timely notice, at 498 Broadway. It is also understood, that in case I should not require possession of the said store on or before the said first day of July, and the said Kemp should continue to occupy the same, he is to pay, in addition to the sum now paid, at the rate of \$4,000 per annum, from the first day of July, until he delivers up possession thereof, which he is to do at any time on receiving three days' notice.

W. B. LAWRENCE.

“I do hereby declare, that I enter into possession of the above described premises, by virtue of the agreement contained in the above receipt or memorandum, and hereby agree with the

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above-named W. B. Lawrence, that I will on my part perform the conditions thereof.

“R. C. KEMP.

“New York, June 7th, 1850.”

It was then proved that the articles mentioned in the complaint were in the store when the defendant took possession under the above agreement, and had not been delivered up by him at the expiration of his term.

The counsel for the defendant then offered to prove that the articles in question were put in the store by the former tenants, Stewart & Patterson; that they were duly mortgaged by them to Newcomb, and were removed by him in the exercise of his legal right as a mortgagee; they also offered to prove that, by the general understanding between landlords and tenants, the articles in question were not deemed to be fixtures.

The learned judge decided that the articles in question were fixtures within the meaning of the agreement between the parties, and that unless the defendant could show that they had been removed by due process of law, he was precluded by the terms of his agreement from setting up a paramount title in any third person. He therefore overruled the whole defence as offered, and instructed the jury that the only question for them to determine, was the amount of the damages to which the plaintiff was entitled. The jury found a verdict for the plaintiff, for \$348³⁴/₁₀₀.

The counsel for the defendant duly excepted to the ruling and charge of the judge, and upon these exceptions the cause was now heard.

D. P. Hall, and *D. D. Field*, for defendant.

J. W. Gerard, for plaintiff.

BY THE COURT. BOSWORTH, J.—This action is brought to recover the value of certain “gas fixtures” and of “seventy stools.”

Such articles, when placed by a tenant in a demised building during his term, are his property. If not removed by him

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during the term, they do not, for that reason, cease to be his property. He may remove them after his term expires without subjecting himself to any damages for such removal, even though he be liable to an action of trespass for an entry on the demised premises. He may mortgage them during his term by a personal mortgage, and they may be levied upon by an execution issued on a judgment recovered against him. (*Holmes v. Tremper*, 20 J. R. 29; *Reynolds v. Shuler*, 5 Cowen, 323; *Smith v. Jenks*, 1 Coms. 96; *Farrar v. Chauffette*, 5 Denio, 527; 2 R. S. 24, § 6, sub. 4, 2d ed.)

The answer avers, and on the trial the defendant offered to prove, that on the 25th of May, 1850, these articles were owned by Stewart & Patterson, and that the plaintiff never owned them, nor had any interest in them. That Stewart & Patterson, on the day last named, mortgaged them to Newcomb; that the mortgage was duly filed, and that Newcomb, as such mortgagee, took and removed them after the hiring of the store by the defendant.

We are of the opinion that these facts, if proved, assuming the mortgage to be valid, as we must do for all the purposes of this motion, would constitute a defence to the plaintiff's action.

If such were the facts, the articles were taken from the defendant by paramount authority. They were taken by the true owner, in the exercise of his rights of absolute property. Such a taking discharges the defendant from his promise to return them to the plaintiff, who is thus shown to have had no interest in them, and to have no right to require the defendant to return them after they have been taken by one from whom neither the plaintiff nor the defendant has any right or power to reclaim them. (*Edson v. Watson*, 7 Cowen, 278.)

If this could be regarded as a taking by process of law, within the meaning of those terms as used in the agreement or lease of June 7, 1850, the damages to which the defendant would be liable for not having given notice of the taking, would be nominal only, if the facts were as the defendant alleges them in his answer.

The complaint does not aver any breach of the contract arising from the defendant's neglect to give the notice. The complaint seeks to charge the defendant with the value of the

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property, on the grounds that he has not returned it as he promised to do, but that, on the contrary, he has removed it from the premises.

The defendant should have been permitted to prove that these articles were the property of Stewart & Patterson on the 25th of May, 1850, and that on that day they mortgaged them by a valid personal mortgage to Newcomb.

If he gave such evidence of these facts as would justify a jury in finding them in his favor, the only question that would remain in the case, as it is now presented to us, would be, were they taken away by the mortgagee in the exercise of his rights as mortgagee? Or were they, in fact, removed by the defendant?

If the removal was in substance and in fact made by the defendant, and the allegation of their having been removed by the mortgagee is a mere pretence, and what the mortgagee said and did was said and done at the instance of the defendant, and as a mere cover for his intended failure to perform his contract with the plaintiff, he would be liable for the value of the articles, if they were intended by the parties to be embraced in their agreement of the 7th of June.

If they were delivered by the plaintiff into the possession of the defendant under that contract, and accepted by the latter under it, we think the defendant would be bound to return them, unless he can justify his omission to do so by proving the facts alleged in his answer. (*Demick v. Chapman*, 11 J. R. 132; *Cook v. Howard*, 13 ed. 276; *Hammer v. Wolsey*, 17 Wend. 91.)

If the removal was in reality the act of the mortgagee, any mere assistance and aid rendered by the defendant, at his request, which any third person might justifiably and properly have rendered at the like request, and necessary to secure the removal of the goods, would not render him liable to the plaintiff, if, on and at such removal, the mortgagee reduced them to possession, and took the actual control of them as such mortgagee.

In an action of trespass for wrongfully taking personal property from the possession of the plaintiff, it has been held to be no defence to the action, that it belonged to a third person;

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and that in such a case the plaintiff is entitled to recover its full value. In *Otis v. Jones*, 21 Wend. 394, it was held that the defendant could not justify such tortious taking or mitigate damages, by showing that he subsequently caused it to be levied upon and sold upon an execution in *his own favor* against the plaintiff.

In 24 Wend. 379, *Higgins v. Whitney*, it was held that in such a case, the defendant might prove in mitigation of damages, that subsequent to the unlawful taking, it was seized on an execution in favor of a third person against the plaintiff. The same point was expressly decided in *Perry v. Chandler*, 2 Cush. 237; *Squire v. Hollenbeck*, 9 Pick. 551; and *Kaley v. Shed*, 10 Met. 317.

These cases were decided on the principle that the property had gone to the plaintiff's benefit, as much as if they had been returned and accepted, and that such application, under such circumstances, operated to the same extent in mitigation of damages.

If such facts will exempt a trespasser, who has illegally taken goods from the true owner, from a liability to more than nominal damages, it is difficult to perceive on what principle a party, who has taken goods from the possession of one who has no interest in them, and with his consent, though on an absolute promise to return them by a day named, may not excuse the non-performance of his promise to return them, by proof, that, in fact, they were owned by a third person, who, in the exercise of his rights of ownership, has taken them into his own possession, and put it out of the power of the defendant to restore them.

It is true the defendant's contract is broken. But in judgment of law the breach of it is no damage to the plaintiff. He had, in fact, no right to have the possession of the goods. The person having the right of property and the right of possession, has taken the goods from the defendant. This he had a right to do, and neither the defendant nor the plaintiff could lawfully prevent it. Such facts, if satisfactorily established, would constitute a defence. The verdict must be set aside, and a new trial granted, with costs to abide the event.

Purdy v. Philips.

PURDY, Executor, &c., of E. BÖLMEY, deceased, v. PHILIPS and others, Executors of J. H. WHITE, deceased.

When a bond is conditioned for the payment of a sum certain and no time of payment is specified, the debt is due immediately without demand, and bears interest from the date of the bond.

(Before OAKLEY, Ch. J., PAINE and BOSWORTH, J.J.)

Nov. 15; Dec. 11, 1852.

THIS action was founded on a bond given by the testator of the defendant to the testatrix of the plaintiff, and dated the 9th July, 1832. The complaint alleged that the whole principal sum mentioned in the condition of the bond was due with interest from the 1st of May, 1850. The bond was in the penalty of \$1,400, and was conditioned to be void on the payment of \$700; there was no mention of interest, but no day of payment was specified, and no demand required.

The answer of the defendant denied that the bond carried interest, and averred that by successive annual payments the principal sum mentioned in the condition had been fully satisfied.

The cause was tried before Mr. Justice Paine and a jury in December term, 1851. Upon the trial the plaintiff admitted that various payments had been made by the obligor in his life-time, and some by the defendants since his death, which, on the 1st of May, 1850, amounted in the aggregate to a sum exceeding the principal debt; these payments were \$60 annually in quarterly payments, from the date of the bond to the 1st of Feb. 1845, and \$42 per annum in quarterly payments, from that time to the 1st of May, 1850, and small extra sums amounting to \$30. The counsel for the defendants insisted, that upon the facts thus admitted, they were entitled to a verdict, as the bond carried no interest, and the payments made were more than sufficient to satisfy the principal.

The counsel for the plaintiffs insisted that in law the bond carried interest from its date, and that the payments made ought therefore to be first applied to the interest, and the surplus only to the principal.

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There was no proof of a demand of payment at any time prior to the commencement of the suit.

The judge directed the jury to find a verdict for the plaintiffs for the penalty of the bond, subject to the opinion of the court at a general term, upon a case to be made.

The cause was now heard upon the case thus directed.

Hoxie, for the plaintiffs, cited 1 Dallas, 349; 3 Cowen, 436; 5 id. 587; 3 John. Cases 310; 9 John. R. 71; 6 John. Ch. R. 21; 1 McCord, Ch. Ca. 220; 9 Term. R. 124; Hurlston on Bonds, 40; 6 Howard, 156.

C. W. Sandford, for defendants, cited 3 Caines R. 234: 7 Wend. 109.

BY THE COURT. OAKLEY, Ch. J.—The condition of the bond upon which this action is brought, is for the unconditional payment of a sum certain, without specifying any time of payment, whether on demand or on a future day; and the only question in the case is, whether the sum mentioned in the condition draws interest from the date and delivery of the bond, or not at all?

The general rule as to interest is, that it is due on all liquidated and certain demands from the time that such demands are payable, and we think there can be no doubt that the sum named in the condition was due immediately on the delivery of the bond. The condition is the acknowledgment of a present existing debt.

The proposition that such a debt bears interest is not only in accordance with the general rule that has been stated, but has been expressly adjudged both in England and in the United States. We refer to the cases of *Farquhar v. Morris*, 9 Term. R. 126, and *Francis v. Castleman*, 4 Bibb. 282.

There must be judgment for the plaintiff with costs, and it must be referred to the clerk to compute the amount now due, making the proper application of the payments to interest and principal.

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St. John v. The American Mutual Fire and Marine Insurance Co.

CHARLES ST. JOHN, and others, v. THE AMERICAN MUTUAL F. & M. INSURANCE COMPANY.

When it is provided by the conditions annexed to a policy of insurance against fire, that the company shall not be liable "for any loss occasioned by the explosion of a steam boiler, or explosions arising from any other cause, unless specially specified in the policy," although fire may be the proximate cause of the loss that is claimed, the company is not liable, when it appears that the fire was directly and wholly occasioned by an explosion.

The exception meant to be created, if otherwise construed, would be senseless and nugatory, since the company, under the general words of the policy, could never be made responsible for a loss occasioned wholly by an explosion, without any immediate action of fire upon the property insured.

When "fire" is the only risk insured against, an insurance company can only be liable, when "fire" is the proximate cause of the loss, and the object of the conditions annexed to the policy is to create exceptions from this liability.

When a loss by fire is proved which is not excepted, it is no defence to the company that the fire was occasioned by the fault or neglect, without fraud, of the assured ^{or} his servants.

Judgment for the plaintiffs reversed, and new trial granted.

(Before OAKLEY, Ch. J., PAINE and BOSWORTH, J.J.)

Nov. 19; Dec. 11, 1852. *Sp. or less amount of insurance to*

APPEAL by the defendants from a judgment in favor of the plaintiffs for \$2,280 82 damages and costs.

The action was on a policy of insurance against fire, and was tried before the Chief Justice and a jury in June, 1851.

It appeared by the policy produced on the trial, that the defendants insured the plaintiffs to the amount of \$2000, "against loss or damage by fire, on their machinery and fixtures, including shafting and fixtures for communicating power contained in the brick building, Nos. 5 & 7 Hague street, city of New York, occupied for mechanical purposes, and also on lathes and tools for making machinery, contained in the said building."

The loss claimed was for the destruction by fire of the property thus insured.

The printed conditions annexed to the policy contained this provision: "If, after insurance effected, the risk shall be increased by any means whatever within the control of the assured, or if such building or premises shall be occupied in

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any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect," and also the following:—

"This company will be liable for losses on property burnt by lightning, but not for any loss or damage by fire happening by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power, nor for any loss occasioned by the explosion of a steam boiler, or explosions arising from any other cause, unless specially specified in the policy."

In an affidavit made by the plaintiffs, which formed a part of the preliminary proofs exhibited to the defendants, and as such was read upon the trial, the fire occasioning the loss was described as follows:—

"That said fire originated on the fourth day of February, 1850, and was immediately preceded by the explosion of a steam boiler upon the said premises, when the walls of the said building (Nos. 5 & 7 Hague street) were mostly thrown down, and the fire which was used in the furnace of the said boiler, and in stoves in various parts of the building, was communicated to the frame and woodwork of the building, and the materials and machinery contained therein," and this account of the origin and effects of the fire was proved to be correct by the testimony of witnesses examined in chief.

On the part of the defendants several witnesses were examined to prove that the explosion of the boiler was imputable to gross negligence on the part of the plaintiffs. It was proved that the probable cause of the explosion was an undue pressure of steam upon the boiler, and that one of the plaintiffs, A. B. Taylor, had been warned by a person of skill and experience, that from the weight of steam under which he was working the engine there was great hazard of an explosion. It was insisted that the conduct of the plaintiffs amounted to an increase of the risk which rendered void the insurance.

It is deemed unnecessary to state in detail, the testimony of the witnesses on the trial, since the decision of the court upon the appeal turned exclusively upon the construction of the policy, and the conditions annexed, and upon the propriety of the charge of the judge upon the question of negligence. When the plaintiffs rested, the counsel for the defendants moved for a non

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suit, upon the ground that the loss proved was excepted from the policy. The motion was denied, and the counsel excepted.

When the testimony was closed, the counsel for the defendants requested the judge to charge the jury as follows:—

That if putting in the boiler in question, and putting on 100lbs. of steam to the square inch, increased the risk after the insurance was effected, then the defendants were entitled to a verdict, whether the plaintiff, Taylor, was or was not negligent.

That the building being destroyed by the explosion, and the insured property being affected as it was thereby, the defendants were not liable, because when the fire reached the property, the property was not in the building in which it was insured, and was not the property insured.

That if the jury believed from the testimony that the boilers would not bear the pressure of 100 lbs. to the square inch, and that Taylor was so informed, and had notice, and had reason to believe, and notwithstanding ordered that amount of pressure put on the boilers, and the explosion and fire were caused thereby, it is such negligence as exonerates the defendants.

The judge then charged the jury as follows:

That the question whether the explosion was caused by an undue pressure of steam or by a deficiency of water, was one which the jury must determine upon the testimony before them. That ordinary negligence on the part of Taylor, would not constitute a defence in this action. But if the insured acted in bad faith, with a design to occasion the loss, or with such negligence as showed a willingness to have the loss occur, or a recklessness, or an indifference whether the course pursued by him should occasion the fire or not, then the plaintiffs were not entitled to recover, and this was matter of fact to be determined by the jury.

The judge also charged, that any change by the insured in the condition of the building, or the mode of occupancy, so as to change the hazard to one of a higher class than that insured against, would constitute a defence, but that such change in the occupancy as did not increase the hazard to a higher class, or

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change the nature or character of the hazard materially, would not constitute a defence. He did not consider that a greater or less amount of pressure upon the boiler, unless it amounted to evidence of the bad faith or indifference to consequences already stated, would constitute a valid defence in law; a mere error of judgment on the part of the insured, as to the amount of steam the boiler was capable of carrying, did not take away his right to recover.

The judge also charged, that the property insured, notwithstanding the destruction of the building by the same accident, or at the same time with the occurrence of the fire, was protected by the policy; that nevertheless it continued to be the property insured, and covered by the policy in contemplation of law.

The judge refused to charge the aforesaid propositions of the defendants' counsel, or either of them, otherwise than as contained in the charge above set forth.

The defendants' counsel then and there excepted to such refusal, and each part of it; and he also excepted to the said charge, and to each part and portion of the same separately.

The jury found a verdict for the plaintiffs, for the amount of their claim and interest.

C. P. Kirkland, for the defendants, in moving for a new trial upon the exceptions, relied upon the following points and authorities:

I. The conditions annexed to a policy form part and parcel of it, as much as if they were inserted in the body of the policy itself. (6 Wend. 494; 2 Den. 78; 2 Comst. 220; 12 Wend. 456.)

II. The defendants are not liable for the loss in this case. 1. By the conditions of the policy, the defendants are not to be liable for "any loss occasioned by the explosion of a steam boiler."

All contracts are to be so construed, if possible, as to give effect and meaning to all the words used in them. Now the subject insured against here is fire, and fire only, and to provide that the defendants should not be liable for loss occasioned

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by the breaking or marring of the property by the concussion arising from a steam boiler explosion, would be supererogatory and unmeaning, for the plain reason that no such loss is insured against. These words can have effect and meaning only by holding them to mean that the defendants are not to be liable for a loss by fire directly or immediately caused by the "explosion." 2. The proof is clear and undisputed that the "explosion" was the direct and immediate means of communicating the fire to the insured property, and that had there been no "explosion," there would have been no "loss." 3. The "loss" therefore was "occasioned" by the "explosion," and is therefore directly within the exception of the policy. 4. At any rate, the words are as comprehensive as language can make them—"ANY loss"—and this necessarily includes the "loss" in question, "occasioned" as it confessedly was by the "explosion."

III. The conditions provide, that if after an insurance the risk is increased by any means within the control of the insured, the insurance shall be void. There is evidence showing, or tending to show, that the putting in the boiler in question, and putting on to it the pressure of steam stated by some of the witnesses, increased the risk.

The judge should therefore have charged as requested by the defendants.

The remarks of the judge on this branch of the case did not meet the case as proved, and did not present the point as the defendants were entitled to have it presented.

IV. There is evidence showing, or tending to show, 1. That the boiler would not bear a pressure of 100 pounds to the square inch. 2. That Taylor had full notice and knowledge of this fact. 3. That nevertheless, he caused that amount of pressure to be put on. 4. That this excessive pressure caused the explosion. 5. That the explosion was the immediate and sole cause of fire doing injury to the insured property. The defendants were thus entitled to ask the judge to charge as stated; and the judge erred in charging generally, as he did, instead of specifically, as he was requested; and the charge was calculated to mislead.

Though, as a general rule, the negligence of the insured is

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not a defence, yet the facts in this case, if the jury believed the defendants' witnesses, constituted a defence.

And as applicable to this case, the rule is too broadly stated by the judge. (1 Strobt. S. Car. R. 281.)

A. L. Jordan and *F. B. Cutting*, for the plaintiffs, resisted the motion for a new trial, upon the following grounds—

I. The execution of the policy, and occurrence of the fire and loss, were duly proved, and the notice of the loss and other preliminary proofs, were produced in due form and read without objection.

II. The judge properly refused to nonsuit the plaintiff on the motion of defendants' counsel. 1. The question of fraud or negligence was not involved in that motion. 2. The question was simply whether the policy covered all losses immediately by fire, except in the excepted cases. 3. That it did is quite clear from the body of the policy. There is a plain distinction between a loss by fire, and a loss by means which may or does occasion fire: Lightning may strike the property into atoms and destroy it, so may the explosion of a steam boiler. So lightning or the explosion of a boiler may occasion a fire which consumes the property, the loss by the violence is not covered by the insurance against loss by the fire. (*Montgomery Mut. Ins. Co. v. Babcock*, 6 Barbour Sup. Court Rep. 637, affirmed by Court of Appeals; *Citizens' Ins. Co. v. Glasgow*, 9 Mo. Rep., cited in U. S. Dig. of 1848, p. 227, Com. Rep.) Nor would insurance against loss by the violence cover a loss by the fire. The contract looks to the proximate or immediate cause of the destruction, not the mediate or remote cause. In the case either of lightning or explosion, if the property survive the violence, which it may do unhurt, and then a fire comes on and consumes it, it makes no difference what occasioned the fire so it be not fraud, which vitiates every transaction. Suppose the condition of a fire policy should declare—"This company will not be responsible for loss by wind," and the property should be destroyed by fire driven by wind from a neighboring conflagration; would that be a loss by wind, or a loss by fire? Would the loss by the remote or that by the proximate cause be intend-

ed by law to be that within the contemplation of the contracting parties. Insuring against wind is insuring against the ordinary effects of wind, blowing down, or blowing away; against explosion, the ordinary effects of explosion, breaking, or crushing. Why then (it may be asked on the other side) if insuring against the fire, the proximate cause, was not insuring against the explosion, the remote cause, was the exception of explosion introduced at all? I answer, by way of caution, to prevent any cavil upon the point whether the fire which raised the steam, which exploded the boiler, which broke the machinery, did not occasion the loss within the meaning of the policy: for points as absurd even as that sometimes present themselves to minds unacquainted with legal reason. It was a useless exception, in view of the legal principle, but was a harmless one; introducing it was the act of the defendants, and the plaintiffs are not called on to defend the propriety of it. It was in the nature of a declaratory contract, and neither a declaratory contract nor a declaratory statute does any harm or any good, except to make the law more plain, or bring it more clearly within the comprehension of the parties.

III. Negligence on the part of the plaintiffs or their servants is no defence to the action, unless of so gross and reckless a character as to afford evidence of bad faith or fraud, or indifference to consequences. The charge in that respect was right.

IV. The question of such negligence was fairly submitted to the jury and negatived by the verdict; the evidence well warranted the finding, and will not be disturbed by the court.

V. Any change in the occupancy of the building which did not increase the hazard to a higher class, or change the nature or character of the hazard materially, such as the substituting one boiler for another, or carrying a little more or less steam, did not constitute a defence. The charge therefore in this respect was right.

VI. Although the building was thrown down by violence, the property, not having been removed, was still in the building and remained the property insured, within the true intent and meaning of the policy. The charge in this respect was also right.

VII. The judge submitted it to the jury whether the 100 lbs.

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of steam put upon the boiler, in connexion with the other facts of the case, amounted to evidence of bad faith or indifference to consequences on the part of the plaintiff: but charged that mere error in judgment in that respect did not take away his right of recovery. This fairly and correctly covered the whole ground embraced in the last request of defendants' counsel to the judge in charging, and was correct in point of law.

VIII. The exception to the judge's charge was too broad, and is of no force unless every portion of the charge was wrong. (*Jones v. Osgood*, Court of Appeals, March Term, 1852.)

BY THE COURT. BOSWORTH, J.—The defendant, by the policy of insurance on which this action is brought, agreed to make good unto the plaintiffs all such immediate loss or damage, as should happen by fire, on their machinery and fixtures in the brick building, situate Nos. 5 & 7 Hague street, in the city of New York.

The policy (in the body of it) provides that the company shall not be liable for any loss or damage by fire, which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military, or usurped power.

Certain conditions were annexed to and made part of the policy, by one of which it is provided and declared that, "this company will be liable for losses on property burnt by lightning, but not for any loss or damage by fire happening by means of any invasion, insurrection, riot, or civil commotion, nor for any loss occasioned by the explosion of a steam boiler, or explosions arising from any other cause, unless specially specified in the policy."

The preliminary proofs of the loss, signed and sworn to by the plaintiffs, state that a fire occurred in the building Nos. 5 & 7 Hague street, on the 4th of February, 1850. That the fire "was immediately preceded by the explosion of a steam-boiler on said premises, whereby the walls of the said building were mostly thrown down, and the fire which was used in the furnace of the steam-boiler and in stoves in various parts of said building, was communicated to the frame and woodwork of said building, and the materials and machinery contained therein. That the foregoing is a correct statement of the manner in which

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the said fire originated, so far as the assured know or believe or have any information."

William M. Tweed, a witness on the part of the plaintiffs, testified that he was assistant foreman of engine company No. 6, that he resided directly in rear of the premises, and that his bed-room window looked right into the building. That he was dressing, when he heard a report like a gun, and looking towards the building, he saw it sinking and a cloud of dust rising. Saw the flame break out before he left the house. The building was a large double one, and became a perfect wreck within a minute. The first fire he saw was near the extreme end; it was rising through the rubbish of the building, a rising flame coming up through the beams of the second story. The fire burned briskly from the time it broke out, being between 7 and 8 in the morning, until 4 P. M., and continued until 6 the next morning.

When the plaintiffs rested, the defendants' counsel moved for a nonsuit, "on the ground that it was manifest from the plaintiffs' testimony, that the insured property was brought into contact with the fire solely by means of the explosion of the boiler, and that then the loss or injury, so far as the same was caused by fire, was occasioned directly by such explosion of the boiler, and that by the express conditions of the policy the defendants were not liable for a loss so occasioned."

The motion for a nonsuit was overruled, and the decision was duly excepted to. The main question arising on the appeal involves the proper construction of the clause, in the conditions annexed to the policy, which declares that this company will not be liable "for any loss occasioned by the explosion of a steam-boiler."

Was the loss in this case occasioned by the explosion of a steam-boiler, according to the natural and obvious meaning of those words, as used in this policy?

Unless this clause will exempt the defendant from all loss or damage by fire which may be caused directly and immediately by the explosion of a steam-boiler, it is wholly nugatory.

All kinds of loss resulting from the explosion of a steam-boiler not producing fire, nor bringing the insured property and

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fire in contact, must necessarily have been borne by the plaintiffs, even if no part of this clause had been contained in the policy. The insurance is only against loss and damage by fire. If there had been no fire, and the insured property had been utterly destroyed by the explosion, no recovery could have been had against the company, even if this clause had been omitted, for the simple reason, that only loss or damage by fire was insured against.

It cannot be supposed that the clause was introduced to guard against a liability which could not by any possibility arise, but to guard against one which might arise but for the existence of this provision. The only one which could arise from the explosion of a steam-boiler, would be for an immediate loss or damage by fire occasioned or communicated by such explosion.

The policy, after providing that the company will not be liable for any loss or damage by fire happening by means of any invasion, &c., adds that they will not be liable "for any loss occasioned by the explosion of a steam-boiler." The most comprehensive terms are here used. And if this loss was occasioned by the explosion, it would seem to be covered by the clause, whether the loss resulted from fire being directly communicated to the injured property, or from its being crushed into worthless fragments.

A loss of the former nature was the only one which the company had any occasion to guard against. We think they have done this by the clause in question.

The preliminary proofs and other evidence show that the explosion communicated the fire in the furnace and stoves directly and instantaneously to the insured property. So far as loss and damage by fire resulted from a burning of the insured property, it was occasioned solely, immediately, and exclusively by the explosion. The explosion and setting on fire of the insured property were simultaneous, and the former caused the latter. It was the actual and immediate cause of the loss.

In *Waters v. The Merchants' Louisville Insurance Company*, 11 Pet. R. 213, 225, the court observed that, "some suggestion was made at the bar, whether the explosion, as stated in the pleas, was a loss by fire, or by explosion merely. We are of

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the opinion, that as the explosion was caused by the fire, the latter was the proximate cause of the loss."

The opinion there expressed was, that as the fire caused the explosion, the loss was caused by the fire. In this case the explosion threw the fire among the insured property, and immediately set it on fire. The loss produced by burning was therefore occasioned by the explosion. The burning of the property was a direct and inevitable result of the explosion, and not a remote consequence of it.

We are of the opinion, that the loss or damage resulting from a burning of the insured property was occasioned, in this case, "by the explosion of a steam-boiler," according to the obvious and proper meaning of those words, as used in this policy, and that the plaintiffs ought to have been nonsuited.

If this view of the case be correct, it is unnecessary to express an opinion upon the exceptions taken to the charge at the trial, and to the refusal of the court to charge as requested by the defendants' counsel.

We think, however, that they are not well taken. In the *Columbia Insurance Company of Alexandria v. Lawrence*, 10 Peters, 517, 518, the court, after discussing the question, expressed the opinion "that a loss by fire occasioned by the mere fault and negligence of the assured, or his servants or agents, and without fraud or design, is a loss within the policy, upon the general ground that the fire is the proximate cause of the loss, and also upon the ground that the express exceptions in policies against fire, leave this within the scope of the general terms of such policies."

We consider this the correct rule, and that the defendant has no cause to complain of the instructions of the court in relation to the branch of the case to which this rule was applicable.

The verdict must be set aside and a new trial granted on the grounds, that the plaintiff should have been nonsuited, and that the evidence subsequently given in relation to the cause of the loss, did not vary the case from that established by the proofs which had been made when the plaintiff rested.

Costs should abide the event.

(The Trial)

Beman v. Green.

BEMAN & WIFE v. GREEN & RADFORD.

The plaintiffs, on the 31st of February, 1851, agreed, for a valuable consideration, to transfer to the defendant Green, a lease, then held by them, of the store, No. 1, Astor House, for the term of five years, from the 1st of May, 1849, and to sell to him the furniture, fixtures, and goods in the store, and the good will thereof. The agreement secured to S. Beman and his wife, and her representatives, free and uninterrupted access to the store, from its date, until the 1st of May following, in order to receive her customers; and for that purpose a counter in the store, described in the agreement, was assigned to her use. On the 10th of February, the price to be paid by Green having been settled by the parties at \$2,708 44, Beman, in consideration of the payment of that sum by a bill of sale, duly executed, transferred, and conveyed to Green his lease of the store, and all the stock in trade, and fixtures therein; but in this instrument the reservation contained in the agreement was omitted. On the 11th of February Green surrendered the lease assigned to him, and took from the landlord a new lease in his own name, for the term of three years and three months, from the 1st of February, 1851.

Held, that the plaintiff, under the agreement, had a legal right to continue in the occupation of the store in the manner and for the time therein expressed.

Held, that this right was not divested by the bill of sale, which was meant *pro tanto* to carry the agreement into effect, and not to deprive the plaintiffs of any of the benefits it secured to them. The two instruments were to be construed together as one transaction.

Held, also, that the rights of the plaintiffs were not affected by Green's surrender of the lease assigned to him, and the terms of the new lease which he then obtained.

The judge, at the trial, having misdirected the jury upon these points, a new trial ordered.

(Before OAKLEY, Ch. J., BOSWORTH and EMMETT, J.J.)

Nov. 26; Dec. 11, 1852.

APPEAL by the plaintiffs from a judgment in favor of the defendants.

The action was for an assault and battery on the person of the plaintiff, Elitha C. Beman, and for ejecting her by violence from her lawful occupation of the store, No. 1, Astor House. It was tried before Mr. Justice Sandford and a jury in ——— 1851; and under the direction of the judge, the jury found a verdict for the defendant. To this direction the counsel for the plaintiffs excepted.

The facts of the case, and the grounds upon which a new trial was granted, sufficiently appear in the opinion of the court.

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S. F. Clarkson, for plaintiffs.

— *Thayer*, for defendants.

BY THE COURT. EMMETT, J.—The plaintiff Beman being the owner of a lease of the store, No. 1, Astor House, for five years from 1st May, 1849, occupied by his wife for the sale of shirts, dressing-gowns, &c., made on the 3d of February, 1851, an agreement in writing with the defendant Green, signed by both of them, in consideration of the premises therein mentioned, to sell to Green the fixtures, furniture, goods, and good will, and his right to the lease of said store. In the agreement, it was in terms mutually understood and agreed, that Beman reserved to himself and wife, or her representatives, the free and uninterrupted access to the store from that date until the 1st of May following, to receive her own customers, or such persons as might come to the store for the purpose of giving her orders for morning-gowns, shirts, &c.; that he, Beman, should have the use and occupation of so much of the room of the store during business hours as might be reasonably necessary for the transaction of the business aforesaid, with as little inconvenience to Green as possible; and that, to prevent doubts or misunderstandings on that point, the irregular counter on the Vesey Street side was by both parties mutually assigned to Mrs. Beman, with the use of the small show-case. Green, in consideration of the premises, agreed to pay Beman such sum of money as should be mutually agreed upon by them on a fair valuation, and in case of disagreement between them, the same should be left to appraisement, &c.

On the 10th February, the parties having settled that \$2,703 44 was the sum to be paid by Green to Beman, a bill of sale, in consideration of that sum, was executed by Beman to Green, of all his right, title, and interest in the lease and good-will of the premises, No. 1, Astor House, and also to all the stock in trade and fixtures contained in said store (described in a schedule annexed), with a covenant of warranty of the property against all and every person and persons whomsoever, and Green paid Beman the above-named consideration.

On the 11th of February, Green had the lease to Beman can-

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celled, and took a new lease from Mr. Astor, the landlord, for 3 years and 3 months, from the 1st of February, 1851. Mrs. Beman remained in the occupation of the part of the store which had been appropriated for her use until the 12th of April following, on which day Green ordered her to leave the store, and on her refusal brought the defendant Radford, a police officer, and directed him to put her out; Radford for that purpose laid his hands upon her and endeavored to eject her, and after some resistance and struggling on her part, she left the store.

The action was brought for this alleged wrong and violence.

The foregoing is a sufficient statement of the facts of the case for the consideration of the question whether a new trial should be granted for misdirection in the law.

According to the printed case submitted to the court, the judge declined expressing any opinion to the jury as to the rights of the plaintiffs under the agreement of the 3d of Feby., 1851, regarding that agreement as a subject for a different suit, but immediately after did charge them that the plaintiffs, under that very agreement of the 3d of February, had only a license and nothing more, and that the defendant Green had a right to revoke the license at his pleasure, and at any time, on giving reasonable notice to the plaintiffs, and that after he had given such notice to the plaintiffs, and revoked that license, the plaintiffs had no right to occupy the store or any part of it, and that the only question for the jury to consider was whether the defendant Green gave reasonable notice to the plaintiffs to remove, and if so, and the defendants did not use more force than was necessary to remove the plaintiffs, then the defendants were entitled to their verdict.

If that statement of the charge be correct, the judge took no notice whatever of the bill of sale of the 10th of February, but held that the agreement of the 3d of February contained in itself nothing more than a license from the defendant Green, which he had a right to revoke at pleasure. It may be, however, that the judge was misunderstood, and that he intended to charge in effect that the agreement of the 3d of February was superseded and rendered inoperative by the subsequent bill of sale, and that the plaintiffs, after the execution of the latter, were in possession by the mere license of the defendant Green.

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It is enough for the purposes of this motion, that the court does not assent to either of those views of the law, and that the charge of the judge, as contained in the case, is considered a sufficient ground for ordering a new trial, and the court is not less inclined to adopt this course, because the defendant Green resorted to no legal proceeding to turn the plaintiffs out of possession, but availed himself of the aid of a police officer, whose presence might have been proper enough to prevent a breach of the peace, but not, as a minister of the law, to turn a party out of possession by even the slightest exercise of force.

New trial ordered, costs to abide the event.

NOEL and another v. MURRAY.

Where the sale and delivery of goods, and the acceptance by the holder of the promissory note of a third person as a payment in full, are simultaneous acts, the presumption of law is, that the payment was meant to be absolute and final.

The general rule, that the acceptance by a creditor of the bill or note of a third person does not operate, unless by an express agreement of the parties, as a satisfaction of a precedent debt, has no application to such a case.

When the sale and the delivery of the goods are simultaneous, the legal inference is that the acceptance of the note, as a final payment, was a part of the agreement, and a condition of the purchase.

If a receipt then given by the seller for the note, expressing it to have been received as a payment in full, may be contradicted at all, it can only be so, by proof of an express agreement that it should be held only as a collateral security.

Judgment for the defendant upon a case reserved.

(Before OAKLEY, Ch. J., PAINE and BOSWORTH, J.J.)

Nov. 19, 20; Dec. 22, 1852.

THE complaint demanded judgment for the sum of \$988 67, as a balance due to the plaintiffs, upon a sale by them to the defendant of a quantity of looking-glass plates.

The answer admitted the sale, but set up as a defence, that the whole debt thereby contracted, amounting to \$1,029, was satisfied at the time by a cash payment of \$38 33, and a delivery

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to the plaintiffs of a promissory note of J. Howland & Son payable in six months from the 23d of September, 1850, and that the plaintiffs, by a receipt in writing then given, acknowledged that the said money and note were received by them as a payment in full.

The cause was tried before Mr. Justice PAINE and a jury on the 14th of April, 1852.

The plaintiffs proved by a clerk that the glass plates were ordered by the defendant, and the order accepted by the plaintiffs on the 8th of October; that all so ordered were subsequently delivered; and that the sum of \$988 69, the balance claimed, was still unpaid. The same witness proved that none of the plates were delivered until the 12th of October.

The defendant's counsel then read in evidence the bill rendered by the plaintiffs, specifying the number, size, and price, of the plates sold. It was dated on the 10th of October, 1850, and was footed at the sum of \$1,029: at the bottom was written the following receipt, signed by the plaintiffs, which was also read in evidence.

“NEW YORK, October 12th, 1850.

“Received from John B. Murray, Messrs. J. Howard & Sons' note, at six months from 17th September, for nine hundred and eighty-eight $\frac{1}{8}$ and thirty-eight $\frac{3}{8}$ dollars, in full for the above bill.”

The books of the plaintiffs were also produced upon notice, and it appeared from the entries therein that they had credited the defendant with the note in question. The plaintiffs then produced the note, which it was admitted had not been paid, and offered to surrender it to the defendant.

No other facts were given in evidence that are deemed material.

Under the direction of the judge a verdict was rendered for the plaintiffs for \$1,092 $\frac{1}{8}$, being the balance claimed, with interest, subject to the opinion of the court upon a case, with liberty to either party to turn the same into a bill of exceptions.

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G. C. Goddard, for the plaintiffs, insisted that they were entitled to judgment upon the verdict, and argued as follows:

It is clear that the goods were not sold for the note, or on an agreement to take the note; but that the goods were selected, the bill of them made out and rendered, and a written order for them, given by the purchaser, presented some days before the giving of a note in settlement of the bill was suggested.

The case then is clearly distinguishable from those in which it is a part of the bargain on a sale of goods, that a note of a third party shall be taken—as was the case of *Whitbeck v. Van Ness* (11 Johns. Rep. 407; also 9 Johns. Rep. 309; *Johnson v. Weed*.)

Even where a note of a third party is taken at the time of the contract on a sale of goods, it is said by Whittlesey, Justice, in *Munroe v. Hoff* (5 Denio, 362), and by Sutherland, Justice, in *Porter v. Talcott* (1 Cowen, 383), not to be payment unless agreed to be received as such.

The note being given after the sale had been made, and there being no agreement to receive it in satisfaction of the debt, at plaintiffs' risk, it is not payment, and the plaintiffs are entitled to judgment on the verdict. (*Tobey v. Barber*, 5 John. Rep. 68; *Porter v. Talcott*, 1 Cowen, 383; *Munroe v. Hoff*, 5 Denio, 362.)

The receipt given for the note and cash being *in full* of the bill, does not import that the note was taken in satisfaction. This was decided in *Tobey v. Barber*, and many other cases.

H. Day, for the defendant, argued that judgment ought to be rendered in his favor upon the following grounds:

I. The sale was not made or consummated until the 12th of October, when the delivery and payment were made; and the law regards the sale fraudulent and void until delivery or part payment is made. (Statute of Frauds, R. S. vol. ii., p. 195.) And therefore,

II. The note of Howard & Son, the note of a third party, was not given for a precedent debt, and the receipt of the note was *prima facie* evidence that it was taken in payment of the

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debt. 1. Because it was taken without endorsement by the defendant, and his endorsement was not asked. (*Bank of England v. Newman*, 1 Ld. Raymond, 442; *Whitbeck v. Van Ness*, 11 John. 409; *Breed v. Cook*, 15 John. 241; *Fydele v. Clark*, 1 Espinasse, 448; *Frisbie v. Larned*, 21 Wend. 452.) 2. The credit of the note to the defendant in the books of the plaintiffs, and the balancing of the books, are *prima facie* evidence that the note was taken in payment (*Frisbie v. Larned*, 21 Wend. 452), which case is approved and cited in the Court of Errors, 3 Denio, 410, and in this court. (*St. John v. Purdy*, 1 Sand. 9). 3. The receipt, reciting that the note with cash is received in full for the debt, is *prima facie* evidence that the note was accepted as payment.

III. It is unnecessary to prove that an agreement was made in so many words, that the note would be received in payment. Circumstances may show it. (1 Cowen 80; *Whitbeck v. Van Ness*, 11 John. 409; *Waydell v. Luer*, 3 Denio, 410; *Arnold v. Campbell*, 12 John. 411; *St. John v. Purdy*, 1 Sand. 9.)

IV. All the circumstances of the transaction show that the note was tendered and accepted in payment, and that the plaintiffs took their choice of the note in preference to giving credit to defendant. 1. The plaintiffs knew nothing of Murray or his credit. 2. There could be no object in the defendant's paying part cash and a negotiable note as security for the remainder of the debt, when he had a credit for six months, as appears in the pleadings, for he would thus lose the interest on his money, and put it out of his power to negotiate the note, so that it would not be at his risk. 3. The plaintiffs did not ask defendant to endorse the note, and he did not endorse it, which is the most common and natural way of securing the liability of the debtor. 4. The receipt is in full for the glass.

BY THE COURT. OAKLEY, CH. J.—It is not necessary to deny that in this state the law is settled, that the acceptance by a creditor of the bill or note of a third person, even when not endorsed by the debtor, never operates as a satisfaction of a precedent debt, unless it is expressly shown that such, at the time, was the understanding and agreement of the parties; and

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it may also be admitted that this rule prevails, even when a receipt is given by the creditor, acknowledging the bill or note to have been received by him as a payment in full. But these admissions are not at all inconsistent with the position that when the seller of goods, at the time of the sale, accepts the note of a third person not endorsed by the debtor, and gives a receipt for it, as a payment, in part or in full, of the price, it is a presumption of reason and, therefore, of law, that the payment so made was meant to be absolute and the purchaser to be wholly discharged. That this is the reasonable and legal presumption we cannot doubt.

The error in the argument of the plaintiff's counsel in this case, consists in assuming the existence of a debt from the defendant, when the parties met on the 12th of October; a debt arising from a sale prior to that day; but, in reality, there was no sale before that day, and, consequently, no precedent debt. The order given by the defendant, and its acceptance by the plaintiffs on the 8th of October, were evidence of a verbal agreement; but as none of the goods were then delivered, and no part of the consideration then paid, the agreement was void under the statute of frauds, so that when the parties met on the 12th, there was no contract upon which either of them was, or could be rendered, liable to the other. The actual sale was made and completed on that day; and as the date and delivery of the goods, and the delivery and acceptance of the note, were simultaneous acts, they must, in our judgment, be considered as parts of one transaction, and the execution of an entire agreement. The sale, by the election of the plaintiffs, was not for cash, or upon credit, but partly for cash, and partly for the note; and the acceptance of the note and the discharge of the defendant thus became conditions of the purchase. All the facts in the case, the entries in the books, and, emphatically, the terms of the receipt, correspond entirely with this view of the intention of the parties, and, as it seems to us, do not admit of any other interpretation. Whether a receipt thus given, and expressed to be for a payment in full, ought not to be held as concluding the plaintiffs, is unnecessary now to determine; but we are clearly of opinion that it cast upon them the burden of proof, and that the conclusion, which its terms necessarily

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suggest, could only be repelled by evidence of an express agreement that the note should be held only as collateral security, and its amount be credited to the defendant only when collected. No such evidence was given or offered upon the trial.

We are therefore of opinion, that the defence set up in the answer has been established, and that the defendant is, upon the facts, as they appear in the case, entitled to judgment.

We remark, in conclusion, that we have not been referred to any adjudged case which is in conflict with the views we have expressed. The observations in *Munroe v. Hoff*, and in *Porter v. Talcott*, are merely *dicta*, while, on the other hand, our present decision is fully sustained by the judgment of this court, in *St. John v. Purdy* (1 Sand. S. C. Rep. 9).

Verdict for plaintiff set aside, and verdict and judgment thereon, with costs, entered for defendant.

BRANDRETH v. SANDFORD.

On the 26th July, 1849, the plaintiff and defendant entered into and signed the following agreement:—

‘C. W. Sandford, having caused a bond and mortgage for \$4,000, from Teunis E. Dikeman to Cathalina Corbett, to be assigned to Dr. Benjamin Brandreth, has received from him on account thereof the sum of \$4,000, bearing interest from the date hereof; and said mortgage is to be foreclosed immediately, and out of the proceeds the said sum of \$4,000 is to be refunded to the said Brandreth, with the interest for the same, at the rate of seven per cent. per annum, until paid, and the residue due on said mortgage is to be paid to the said C. W. Sandford.’

Held, that this agreement did not necessarily import a personal liability on the part of the defendant for the sum received, and that prior transactions between the parties which led to the agreement, might be properly resorted to for the purpose of showing that he was acting only as the agent of the mortgagee.

Held, also, that the agreement did not by its terms imply that the mortgage was assigned as a security for the repayment of the \$4,000 as a debt, but that by its fair interpretation it was evidence of a purchase by the plaintiff of an interest in the mortgage to the extent of the sum that he advanced.

Held, also, that if the defendant could be rendered liable at all, he could only be so as a surety, it being the manifest intent of the parties that the mortgage securities should be the primary fund for the reimbursement of the plaintiff.

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Held, therefore, that *quidcumque videtur*, the plaintiff was not entitled to recover, as he had failed to aver or prove that he had exhausted his remedies upon the bond and mortgage.

Judgment for the defendant, Bosworth, Justice, dissenting.

(Before OAKLEY, Ch. J., PAINE, BOSWORTH and EMMETT, J.J.)

Nov. 15, 1852; Jan. 29, 1853.

THIS was an action for the recovery of \$4,000 as moneys lent and advanced by the plaintiff to the defendant, and was tried before the Chief Justice and a jury, in March term, 1852.

The following are the material facts, as established by the pleadings and the evidence:—

The complaint alleges that between the 9th July, 1846, and the 26th July, 1847, the plaintiff lent and advanced to the defendant, at his request, \$4,000, partly in cash, and partly in a promissory note, which, when due, was paid by the plaintiff; and that the defendant promised to pay the said sum of \$4,000 when required, with interest from the 26th July, 1847; and that he is indebted on account thereof, \$1,965 76 principal, with interest from the 27th November, 1850.

The answer denies the allegations in the complaint, and alleges that at or about the times therein stated, the defendant, as the agent and attorney of Cathalina Corbett, received from the plaintiff \$4,000, or thereabouts, as the consideration money of an assignment, or assignments, of a certain indenture of mortgage made by Teunis E. Dikeman to Mrs. Corbett, dated 15th November, 1841, for \$4,000 and interest. That the money mentioned in the complaint was received by the defendant, as the attorney and agent of Mrs. Corbett, as the consideration money payable by the plaintiff to her on the assignment of such mortgage, and that such assignment was received by the plaintiff in full payment and satisfaction of said money.

The reply denies these allegations in the answer.

The evidence on the trial, which was entirely documentary, and produced on the part of the plaintiff only, shows the following facts in the order of their occurrence.

On the 15th May, 1843, Mrs. Corbett, being the owner of the mortgage from Dikeman mentioned in the answer, gave her bond to John Strang to secure the payment of \$2,000, with interest; and as security for such bond gave him an assignment

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of the Dikeman mortgage, with the bond therein mentioned, with a proviso that if she should pay her bond to Strang, the assignment should be void.

On the 9th July, 1846, the defendant obtained from the plaintiff his note at ninety days, for \$1,750, payable to defendant's order; and at the same time gave him a receipt for such note, which receipt stated that the note was to be provided for and paid by him, the defendant, out of the first proceeds of a bond and mortgage from Dikeman to Mrs. Corbett, left in his hands for collection; and this receipt was signed by the defendant, as solicitor for Mrs. Corbett.

On the 10th October, 1846, the day on which the plaintiff's note for \$1,750 became due, defendant gave him a written acknowledgment, stating that there was due to him \$1,750, bearing interest from that date, for which he, defendant, was to give him his note, endorsed by John Strang, payable at three months, *or* an assignment of the mortgage above mentioned, from Dikeman to Mrs. Corbett, then in his hand for collection, out of the proceeds of which mortgage, the said \$1,750 and interest was to be paid.

On the 20th November, 1846, Mrs. Corbett executed an assignment to plaintiff of the bond and mortgage from Dikeman to her, subject to the assignment theretofore made by way of mortgage to Strang. The consideration mentioned in this assignment to plaintiff, was \$4,000—the face of the mortgage. The actual consideration was the \$1,750; then due to the plaintiff.

On the 21st May, 1847, Strang executed to the plaintiff an assignment of the same mortgage, by which plaintiff became legally vested with the entire interest in that mortgage, divested of Strang's lien. The consideration mentioned in this assignment from Strang to plaintiff, was \$2,000, which was the amount of principal due Strang from Mrs. Corbett.

On the 26th July, 1847, about a month after the date of Strang's assignment to plaintiff, a paper was signed by both plaintiff and defendant, stating that he, the defendant, having caused the bond and mortgage for \$4,000 to be assigned to the plaintiff, had received from him on account thereof, the sum of \$4,000, bearing interest from that date. That the mortgage

was to be foreclosed immediately, and out of the proceeds the said sum of \$4,000 was to be refunded to the plaintiff, with interest at seven per cent., until paid; and that the residue due on the mortgage was to be paid to the defendant.

The plaintiff, as the owner of the mortgage, foreclosed it about three years afterwards, claiming that there was due and unpaid upon it the principal sum of \$4,000, with interest from the 20th November, 1846, the day upon which it was assigned to him by Mrs. Corbett. Neither Mrs. Corbett nor the defendant was made a party to the foreclosure. The mortgaged premises were sold under the decree of foreclosure, for \$3,700, and purchased by the plaintiff. The principal and interest due on the mortgage, with costs, arrears of taxes, and expenses of sale, &c., amounted to \$5,665 76, being on the 27th November, 1850, \$1,965 75 more than the price which the premises brought at the sale; and the plaintiff, in his complaint, claims that sum with interest from that date, as the amount due him by the defendant.

At the trial, the defendant moved, on the plaintiff's evidence, to dismiss the complaint, which motion was denied.

The jury, under the direction of the court, found a verdict for the plaintiff for \$1,965 26, with interest from November 27th, 1850, subject to the opinion of the court at general term, on a case to be made, with liberty to either party to turn it into a bill of exceptions.

J. J. Hoffman, for the plaintiff, insisted that he was entitled to judgment upon the verdict upon the following grounds:

I. The receipt of \$4,000 from the plaintiff by the defendant is not denied.

II. The defence, as gathered from the answer, is as follows:
1. That the several sums of money were received by defendant as the agent of Cathalina Corbett. 2. That they were so received as the consideration money, payable by said plaintiff to said Corbett upon the assignment of a certain mortgage; and the assignment of said mortgage was received by said plaintiff, in full payment and satisfaction of said sum of money.

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III. The money was not received by defendant as the agent of Cathalina Corbett; or if it was, defendant made no declaration, at the time, of his agency to plaintiff. 1. The receipt, dated July 6, 1846 (see fol. 19 of case), contains a promise that the note there mentioned shall be provided for and paid by himself ("by me"), and although signed by him as solicitor, yet it is his personal promise, and not his promise as agent, nor the promise of C. Corbett. The fact of the note of plaintiff being payable to and endorsed by the defendant also shows the personal nature of the transaction. 2. As solicitor, he had no power to borrow notes and pledge his credit for the payment, and the signing as solicitor is not an avowal of agency. Should the plaintiff seek to charge C. Corbett upon the instrument, he would be compelled to prove more than that C. W. Sandford was her solicitor. The burden of proving direct agency or authority would be upon him, and that burden now rests upon the defendant. 3. The acknowledgment of October 10, 1846, is a distinct personal obligation to secure, in one of two ways, \$1,750; in which he acknowledges himself to be indebted to plaintiff. 4. So also the writing of July 26, 1847, the obligation is personal. 5. It is also the last in order of time, and for that reason controls any doubt arising out of the manner of the execution of the former document.

IV. Even if he had disclosed his agency (of which there is no proof), yet having signed in his own name contracts and memoranda in writing which do not upon their face show that he was acting as the agent of another, he is personally liable. (Story on Agency, § 269; and cases cited in note.)

V. The four thousand dollars were not received as the consideration money payable by plaintiff to said Corbett, upon the assignment of said mortgage, nor was the assignment received by said plaintiff in full payment and satisfaction of said sums of money. 1. At the time of the assignment, the mortgage was encumbered for half its amount, viz., \$2,000; subject to which encumbrance the assignment was taken. 2. "Consideration money," payable upon the assignment of a mortgage, necessarily implies an absolute purchase; but here an agreement is made with Sandford, supplemental to the assignment, regulating the disposal of the proceeds. If the assignment was by way of sale,

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for a consideration, nothing but the assignment itself was required. 3. B. Brandreth, as between himself and Sandford, never had the absolute control and right to dispose of the mortgage at his pleasure. 4. There being no purchase, no money was paid as consideration money. The allegation that it was so received, and that the assignment was received in satisfaction thereof, as contained in the answer, must be considered as an entire allegation, and the one part necessarily falls with the other.

VI. The advance of \$4,000, by plaintiff to defendant, was by way of loan. 1. Upon the credit of C. W. Sandford he acknowledges the receipt, and promises to secure the sum of \$1,750. The agreement of 26th July, 1847, explains the manner of the execution of the receipt of July 9th, 1846. 2. Personal credit was given to defendant, that he would pay the note out of a fund particularly applied to that purpose. 3. The note not having been provided for, he executed the acknowledgment bearing date October 10, 1846. The words, "for which," here mean "to secure which," for the \$1,750 is to be paid out of the proceeds. The assignment was not to be absolute. 4. Afterwards, C. W. Sandford, "having caused" (not Cathalina Corbett having assigned) the bond and mortgage to be assigned, executed the writing dated July 26, 1847. The fact contained here, that money is to be refunded, necessarily conveys the idea of a loan. Loans are refunded. Consideration money is absolute upon a purchase.

VII. The point raised on the trial, that the advance of \$4,000 was a loan by plaintiff to defendant, upon particular securities, to which alone he agreed to look for payment, is not made a ground of defence in the answer, and is in no way raised by the pleadings. It should not be considered by the court. *a.* The fact that the security was to be immediately foreclosed and the advance refunded, precludes the idea of a loan for the sake of an investment.

VIII. As between the parties to this suit, the Dikeman mortgage should be considered as having been under the control of C. W. Sandford, and by him caused to be assigned, by way of mortgage or collateral security, to the plaintiff, to secure an indebtedness of \$1,750, previously incurred by defendant ;

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together with a subsequent advance. 1. In each of the written instruments in evidence, signed by Sandford, there is a distinct acknowledgment of indebtedness, and no one of them contains a waiver of personal liability. The securities are additional to the defendant's obligation or liability. 2. The promise to pay out of the proceeds of the mortgage, is the application of a particular fund to the payment of the debt. It implies no release of any other security.

IX. The taking of a mortgage to secure a debt does not extinguish the original debt, so long as it remains unsatisfied. The one is the principal, the other the incident; and the latter cannot merge in the former. (*Sterling v. Rogers*, 25 Wend. R. 658: see also 15 Wend. R. 218.) 1. The taking of collateral security for his indemnity would not prevent the plaintiff from resorting to an implied promise, unless it was agreed that he should only look to such security. (4 Pickering's Rep. 444.) 2. In this case the advance of the money constituted the debt, part of which is yet unpaid. The mortgage was taken for security and indemnity. It was not intended to change the nature of the debt, and there was no agreement to look alone to the security.

X. The securities have been exhausted, and the sheriff reports a deficiency, Nov. 27, 1850, of \$1,965 76.

XI. In this amount, therefore, defendant is personally liable, and judgment should be entered upon the verdict, with costs.

The defendant in person made and argued the following points:

I. The loan to Strang of \$1,750 was a separate transaction, and was closed by Strang's assignment to the plaintiff in May, 1847; and the money due to Strang was a prior lien on the mortgages payable out of the first proceeds.

II. The plaintiff dealt with the defendant as the agent of Strang & Corbett, and recognised him as such agent.

III. The plaintiff paid the balance of the \$4,000 as a purchase of the bond and mortgage, and took Mrs. Corbett's assignment therefor, without any covenant or guarantee; and the whole transaction between Corbett and Brandreth was a pur-

chase and sale of the mortgage, involving no personal liability of any kind on the part of the defendant.

IV. There was no promise, express or implied, on the part of the defendant, to pay any deficiency upon the foreclosure of the mortgage.

By THE COURT. EMMETT, J.—If the plaintiff has any claim in this action, it must arise on the paper of the 26th July, 1847, the last in point of date, and which was signed by both parties.

He could have no specific demand for the \$1,750 mentioned in the paper of the 10th October, 1846, because the defendant's engagement in regard to that sum was that he should give for it either his note endorsed by Strang or an assignment of the Dikeman mortgage. The assignment of that mortgage was given to the plaintiff, which was a performance of defendant's agreement, and acquitted him of any personal obligation in respect to the \$1,750.

In addition to the \$1,750 and the interest due on it, the plaintiff subsequently advanced as much more as made up \$4,000; and for this subsequent advance he received an assignment of Strang's lien, which made him the sole legal owner of the Dikeman bond and mortgage. The \$4,000 was the consideration for the entire sale of that bond and mortgage to him, and unless he stipulated for some additional security, or reserved some ulterior right against Mrs. Corbett or the defendant, he was to look to that bond and mortgage alone for reimbursement; and the defendant's answer in that respect is strictly true.

But it is contended that by the paper of the 26th July, 1847, the defendant acknowledged that he had received \$4,000 from the plaintiff, and that as this paper does not on its face disclose any agency for Mrs. Corbett, such acknowledgment raised an implied personal promise on defendant's part to pay the \$4,000.

The answer to that is, that the paper of the 26th July, 1847, was a part of the same transaction that gave rise to the receipt of the 9th July, 1846, and the paper of the 10th October, 1846, in both of which the defendant explicitly stated his agency. It is not pretended that the \$4,000 was not made up in part of

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the \$1,750 mentioned in those two antecedent papers, or that the mortgage mentioned in the paper of the 26th July, 1847, was a different mortgage from that described or referred to in those previous papers, in both of which it was expressly stated that the bond and mortgage were in defendant's hands for collection, and the earliest of which was signed by the defendant as solicitor for Mrs. Corbett, thus disclosing the party for whom he was acting. Both those papers were made evidence by the plaintiff himself, and rendered it unnecessary for the defendant to offer any other or further proof of his agency. They sufficiently established the allegation to that effect in his answer; and the assignment of the mortgage executed by Mrs. Corbett, which was also put in evidence by the plaintiff, proved her ownership of the mortgage, her knowledge of the transaction, and her assent to it. We have no right, therefore, to regard the paper of the 26th July, 1847, otherwise than in connexion with those previous documents, in considering this question of defendant's personal liability under it. They are all parts of a continued negotiation in relation to the same subject matter, in the very inception of which the defendant gave the most ample notice of his agency, disclosed the name of his principal, and subsequently procured her ratification of his acts in her behalf.

But even if the agency of the defendant were not sufficiently established, how would the parties stand under the paper of the 26th July, 1847?

On the one hand, the plaintiff acknowledged by it that the defendant had caused the Dikeman bond and mortgage for \$4,000 to be assigned to him. On the other, the defendant acknowledged that he had received from the plaintiff on account thereof \$4,000, bearing interest from that date; and they agreed,—first, that the mortgage should be foreclosed immediately; second, that out of the proceeds the \$4,000 should be refunded to the plaintiff, with interest at seven per cent. until paid; third, that the residue due on the mortgage should be paid to the defendant.

It appears then by that paper, that on the day it bears date, the plaintiff's whole advances amounted to \$4,000, and no more. But there was then due on the Dikeman bond and mortgage

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not only \$4,000 principal, but interest from the 20th of November, 1846. The foreclosure proceedings show this.

The amount due on the bond and mortgage, therefore, exceeded the sum of plaintiff's advances by the amount of this cash interest. The paper itself shows that no deficiency on the contemplated foreclosure was anticipated by either party, but on the contrary, that it was assumed that the foreclosure would yield the full amount of principal and interest due on the mortgage, in which event, after refunding to the plaintiff his \$4,000 with interest, there would be a residue or surplus; and it is manifest that the object of this paper was to provide a check upon the plaintiff's having a greater interest in the bond and mortgage under the assignment which he held, than would be an equivalent for the sum paid by him with interest. Without that paper the assignment would have operated as an absolute sale to the plaintiff of all that was due on the bond and mortgage, for interest as well as principal; and it was not intended that he should have as profit or usury on the transaction, the excess of what was due on the bond and mortgage beyond what he had paid with interest. That paper was drawn therefore, not for the benefit of the plaintiff, but of some interest represented by the defendant; whether Mrs. Corbett's or his own, is immaterial so far as the plaintiff is concerned. It was an equitable defeasance of the assignment, as to all benefit from it beyond the sum advanced by plaintiff with interest. It provided in distinct terms that the residue due on the mortgage, after refunding the plaintiff's \$4,000 with interest, should be paid to the defendant, which merely meant that it should not be paid or go to the plaintiff; and it contained no undertaking or guarantee on the part of the defendant either personal or fiduciary, to pay anything to the plaintiff in any event. The plaintiff was to look to the proceeds of the mortgage, not merely as the primary source but as the only source from which he was to receive his \$4,000 with interest, and that he was to do by an immediate foreclosure—not for the sake of his own interest merely, but for the more certain realization of the residue which did not belong to him. That paper in fact made him a trustee as the holder of the mortgage, for the defendant, in respect to such residue; and if by his delay in not foreclosing immediately but deferring

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it for three years, while the interest was accumulating on his own \$4,000, and on the mortgage debt, it could be shown that the property had so depreciated in value as to have caused the mortgage on foreclosure to yield less than sufficient to pay the full amount of principal and interest due on it, so far from having any demand for a deficiency of his own proper claim under it, he would be more likely to have made himself liable to the defendant for having thus occasioned the loss of the surplus or residue, which by the terms of that paper was to be paid to him.

Even if the defendant had been the acknowledged debtor to the plaintiff, and it was admitted that the assignment of the bond and mortgage had been merely as collateral security for such debt, the immediate foreclosure of the mortgage was made an essential part of the consideration for giving such security ; and the plaintiff's unexplained neglect to comply with that condition was a failure of consideration on his part, which the defendant might have set up against any attempt to make him liable for the deficiency. That the engagement to foreclose rested on the plaintiff, admits of no question. It could have rested on no other party. He was the holder and owner in law of the bond and mortgage, and as such, did actually foreclose in 1850 ; and it does not appear, nor is it pretended, that the defendant was to have, or that he had in fact, any control over, or agency in the foreclosure proceedings. The delay, therefore, in taking those proceedings, lies at the plaintiff's door. Nor would he have stood on sure ground, even if he had foreclosed immediately ; because he took the bond and mortgage under an agreement to look, directly and in the first instance, to the proceeds for his money, thus, by his own act and consent, placing the defendant in the position of a mere surety to be called upon only in the event of a failure of the primary source or fund. The bond and mortgage together constituted that source. They were inseparable, and had both been assigned to him as one asset or item of property ; and he was bound therefore to have exhausted his remedy on the bond as well as the mortgage before he could have recourse to the defendant. It does not appear that he has done so ; and the presumption is, that he still holds the bond, which may be perfectly good against the estate of the

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obligor. He has not even tendered back the bond to the defendant as a preliminary to his demand against him; and he surely could not recover in this suit and retain the bond also.

If we view this case, therefore, in the most favorable light for the plaintiff, his claim is beset with difficulties. In its true aspect, as already shown, it is clear that he has none that can be enforced; and the defendant is, therefore, entitled to judgment.

BOSWORTH, J. (dissented.)

The complaint alleges, that between the 9th of July, 1846, and the 26th of July, 1847, the plaintiff loaned to the defendant \$4,000 in cash, and a promissory note of the plaintiff, which note the plaintiff had paid, and alleges a balance of \$1,965⁷⁴/₁₀₀, with interest from November 27, 1850, to be due.

The defendant, in his answer, denies that any loan was made to himself. He avers that he received the \$4,000, as the agent and attorney of Cathalina Corbett, as the consideration money of an assignment or assignments of a mortgage for \$4,000, executed by Teunis E. Dikeman to Cathalina Corbett, bearing date the 15th of November, 1841.

That he received this money as the agent and attorney of Cathalina Corbett, "as the consideration money payable by said plaintiff to the said Corbett, upon the assignment of said mortgage," and the assignment of said mortgage was received by said plaintiff in full payment and satisfaction of said sum of money.

The allegations of new matter contained in the answer are put in issue by the reply.

The pleadings are sworn to.

The evidence is entirely documentary. The paper of July 26, 1847, shows incontestibly that the bond and mortgage were not sold to or purchased by Brandreth. Out of the proceeds of it when foreclosed, \$4,000, with interest from the date of that paper until paid, was to be "refunded" to Brandreth, and "the residue due on said mortgage was to be paid to the defendant."

This paper is signed by the plaintiff and the defendant. It is clear, then, that this money was not paid as the price or consideration of the assignment. The whole ownership of the bond and mortgage did not belong to Brandreth. The whole of the

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moneys owing upon and secured by them, if collected, would not belong to him.

Hence a material allegation of the answer is disproved. That the defendant received the whole \$4000, is admitted. That this sum, "with interest at the rate of seven per cent, per annum, until paid, is to be refunded to said Brandreth," this agreement expressly states.

Hence it is evident that this sum was "advanced," and not paid as the price of the bond and mortgage. That it was to be "refunded" with interest until paid.

To whom was it advanced, and by whom was it to be refunded? The defendant admits in his answer that he received it, but denies that it was to be refunded at all events. He answers, that the assignment was taken in payment and satisfaction of it.

That the assignment was taken in payment and satisfaction of the \$4,000, is disproved by the defendant's agreement, and that it was to be refunded is expressly stated in the same instrument.

The defendant received the money. If he received it as principal, he is the person bound to refund it. He avers that he received it as agent. On this, the reply takes issue. The paper of July 26, 1847, does not profess on its face to have been signed by him as agent, nor does it intimate that he received the money as agent. It recites, that he had caused the bond and mortgage to be assigned, and had received "on account thereof," \$4,000.

This language implies that the assignment was an act, in respect to which he was the principal, and in good sense and legal effect is equivalent to saying that he had assigned them. The agreement does not recite that Mrs. Corbett had assigned them, or that she was the owner of, or had any interest in them, or in the money received from the plaintiff, or that she was to be paid the excess owing on the bond and mortgage over and above the amount advanced by Brandreth.

Although the fact of his agency was distinctly put in issue by the pleadings, the defendant gave no evidence to show that he was in truth such agent, or even professed to be; when he obtained the additional advance of \$2,250.

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If the right of the plaintiff to recover is to be determined solely by the terms and legal import of the paper of the 26th of July, 1847, I think it undeniable that the defendant would be regarded as the person to whom the advance was made, and who was to refund it.

This is the last agreement executed in point of time. If this imposes a personal obligation on the defendant, then I think that he cannot claim exemption from such liability, even if the papers of July 9th, and October 10th, 1846, are consistent with the idea that at those dates he was acting as agent, unless he proves affirmatively that he in fact acted throughout as agent, and that he so stated to Brandreth.

To hold, that as all the papers evidently relate to distinct parts of the same transaction, and that enough is disclosed on the first to prevent the defendant from being estopped from proving that he acted throughout as agent, is altogether a different proposition from holding that the first shows that he in fact acted only as agent, at the time it was executed, and also at the time when the last was executed, which imports on its face that he acted as principal and on his own account.

The first paper in order of time is in these words, viz. :—

“Received N. Y. July 9, 1846, from Dr. Brandreth, his note at 90 days for \$1,750, to be provided for and paid by me, out of the first proceeds of a bond and mortgage left in my hands for collection, drawn by Teunis E. Dikeman in favor of Cathalina Corbett.

(Signed) CHARLES W. SANDFORD,
Sol. for said C. Corbett.”

In this instrument the defendant personally undertook to pay this note out of the first proceeds of a bond and mortgage. I think he also undertook to collect, or endeavor to collect, the bond and mortgage, to raise the means of paying it. This note was evidently loaned. To whom was it loaned? Was it loaned to Cathalina Corbett? He adds to his signature, that he was her solicitor. That does not prove that it was loaned to her. Can it be implied that he had received this bond and mortgage from her, to foreclose on her account? This paper does not

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state that he had. On other facts proved by record evidence, it is not apparent how that fact could be so.

On the 15th of May, 1843, over three years previously, she had executed her bond to John Strang for \$2,000, and had assigned to him the bond and mortgage in question as collateral security for its payment, which assignment was recorded on the 14th of June, 1843.

Strang held this assignment until May, 1847, nearly a year after this paper of July 9, 1846, was executed.

Without actual proof of the fact, it cannot be presumed, in contradiction of this evidence, that the bond and mortgage were in the hands of the defendant on the 9th of July, 1846, as the agent of Mrs. Corbett, or that he held it to be foreclosed by him as her solicitor.

The legal title to them was in John Strang, and when foreclosed, he was entitled, as a matter of legal right, to be first paid out of the proceeds, the amount due on Mrs. Corbett's \$2,000 bond which she had executed to him.

If he was the agent of any one, the presumption most favorable to fair professional conduct is, that the defendant, in agreeing that the first proceeds of this bond and mortgage, to the extent of \$1,750, should be applied to pay the note borrowed of the plaintiff, made such agreement in behalf of the party to whom such proceeds of right belonged. It is conclusively shown that they belonged to Strang and not to Mrs. Corbett. What was done with this \$1,750, is not shown.

The fact that Strang, by assignment, held the bond and mortgage in question, as security for \$2,000 due him, in connexion with the terms of the paper of July 9, 1845, and the one of October 10, 1846, the next in the order of time, furnishes some grounds for inferring, that the \$1,750 note was obtained to be delivered to Strang. Whether the defendant was interested as principal, or acted as agent for Mrs. Corbett, or Strang, or on his own account, in obtaining the money, is the fact to be ascertained from the paper writings put in evidence.

The paper of October 10, 1846, the second in the order of date, is in these words.

“Due Dr. Benjamin Brandreth seventeen hundred and fifty

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dollars, bearing interest from this date, and for which I am to give him my note, endorsed by John Strang, payable at three months, or an assignment of a mortgage now in my hands for collection, made by Teunis E. Dikeman to Cathalina Corbett, on house, No. 250 Elizabeth street, out of the proceeds of which mortgage said \$1750 and interest is to be paid.

“CHARLES W. SANDFORD.

“New York, October 10, 1846.”

It will be borne in mind, that the note for \$1,750 fell due on this day. The defendant had not provided for and paid it, according to his agreement of July 9th. It does not appear that he had taken a step towards foreclosing the mortgage. It became necessary for the plaintiff, of whom it had been borrowed, to pay it, or suffer it to be protested.

The defendant then entered into a new agreement, by the express terms of which he acknowledged himself indebted to the plaintiff in the sum of \$1,750, bearing interest from its date at the rate of 7 per cent., the payment of which he agreed to secure in one of two specified ways.

It is well settled that where one person, by instrument in writing, acknowledges a certain sum to be “due” to another, an action will lie to recover it. The acknowledgment of indebtedness itself creates a legal liability sufficient to sustain the action. The language is equivalent to a formal promise to pay it.

Elder v. Roux, 15 Wend. 218, and cases there cited. The consideration of the indebtedness thus acknowledged, is Brandreth's note of \$1,750, mentioned in the paper of July 9, 1846, and which the defendant personally promised to provide for and pay.

This agreement is not signed as solicitor or agent for any person, and the \$1,750 mentioned in it have not been repaid.

Whose contract is it? In terms it is his. And even though he had added to his name the word agent, or solicitor, yet when personally sued on it, he could only avoid a recovery against himself, by showing that he was in fact the agent of another person, and authorized to contract on such terms (*Rossiter v. Rossiter*, 8 Wend. 494; *Mills v. Hunt*, 20 Wend. 431–434).

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The *onus* of showing actual agency and authority lies on the agent; describing himself as agent does not prove him to be an agent, nor is it any evidence of that fact (*White v. Skinner*, 13 J. R. 307-311).

The only effect of adding the designation of agent, is, to make it competent for him to prove, when sought to be charged personally, that he was in reality acting as a known agent.

Suppose, after executing the paper of October 10, 1846, the defendant had failed, or refused to give his note at three months, endorsed by Strang, or an assignment of the bond and mortgage, could Cathalina Corbett have been sued on that agreement, as being her agreement, to recover back the \$1,750?

It does not purport to have been made on her behalf, nor does her name appear on it as principal. By well settled cases, it is, in judgment of law, the personal contract of the defendant (*Pentz v. Stanton*, 10 Wend. 271; *Stackpole v. Arnold*, 11 Mass. 27).

"It is not sufficient that a person, in order to discharge himself from a promise in writing, should show that he was in fact the agent of another, but it should be made to appear that he treated as agent, and actually bound his principal by the contract." Here there are no words, in either of the contracts of October 10, 1846, or of the 26th of July, 1847, which furnish any indication of an intent to charge any person other than himself. And no action would lie against the alleged principal, on either contract merely, without extrinsic proof (*Arfredson v. Ladd*, 12 Mass. 178).

It may be, that as the first paper signed by the defendant has, as an addition to his signature, the words: "Sol. for said C. Corbett," it is competent for him to show that in fact he acted as agent, and at the time so avowed to the plaintiff, and that he had no personal interest in the matter (*Evans v. Wells*, 22d, 324-341).

But without intimating any opinion on this point, it is sufficient to say, that although the fact of his being an agent was put in issue by the pleadings, and although he held the affirmative of that issue, he offered no evidence to establish it. The contracts of October, 1846, and of July, 1847, the two last in

order of time, do not on their face purport to be the contracts of Mrs. Corbett, or to have been made in her behalf.

I think it cannot be denied that if the contract of the 10th of October, 1846, had not been performed, or if it had turned out that the bond and mortgage recited in that of July, 1847, to have been assigned, had previously been paid, or had been forged, an action would have lain on either against the defendant personally, and not against C. Corbett, without extrinsic proof; but whether such proof would have been admissible is a question that does not now arise.

If this be so, then the only point left, bearing on the question of the defendant's personal liability, is this. Did the plaintiff advance his \$4,000 upon an agreement to look solely and exclusively to the proceeds of the assigned bond and mortgage?

The agreement of July 27, 1847, does not so state in express terms. Its terms perhaps imply that the parties contemplated the proceeds would prove sufficient to reimburse the \$4,000 with interest, and leave a surplus to be paid to the defendant.

But that and the paper next prior in date, seem to indicate very clearly, that the money advanced by the plaintiff was a loan, and was to be refunded at all events.

In the paper of October, 1846, the defendant, in addition to acknowledging himself personally indebted for the amount of \$1,750, agreed to give security for its payment.

The security for the repayment of the \$1,750 was to be either his own note at three months, with John Strang as an endorser, or an assignment of the whole of his bond and mortgage, the agreement being that if the bond and mortgage were assigned, the \$1,750 and interest should be paid out of its proceeds. This \$1,750 was lent, and has not been repaid.

This paper shows, that on failure to provide for and pay the note borrowed on the 9th of July, the defendant, on the day of its maturity, acknowledged himself indebted, as principal, to the plaintiff, for the amount of it, with interest until paid; and in addition agreed to furnish to the plaintiff one of two kinds of security for its payment. All that the plaintiff had advanced up to this time was \$1,750. This was incontestibly lent. The defendant had obtained the loan, and signed a contract acknowledging himself the debtor.

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The next paper executed by the defendant was that of the 26th of July, 1847. At the latter date the defendant had been personally the debtor of the plaintiff for \$1,750 lent, from the 10th of the previous October.

On the 26th of July, 1847, he and the plaintiff signed a contract in these words:—

“C. W. Sandford, having caused a bond and mortgage for \$4,000, from Teunis E. Dikeman to Cathalina Corbett, to be assigned to Dr. Benjamin Brandreth, has received from him on account thereof, the sum of four thousand dollars, bearing interest from the date hereof; and said mortgage is to be foreclosed immediately, and out of the proceeds the said sum of \$4,000 is to be refunded to the said Brandreth, with the interest for the same at the rate of seven per cent. per annum, until paid, and the residue due on said mortgage is to be paid to the said C. W. Sandford.

(Signed)

B. BRANDRETH,
C. W. SANDFORD.”

Between the date of this agreement; and the 10th of the previous October, Mrs. Corbett assigned to the plaintiff on the 20th of November, 1846, the bond and mortgage, subject to the assignments which she had theretofore made of the same by way of mortgage on the same; and Strang, on the 21st of May, 1847, also assigned to the plaintiff the same bond and mortgage, subject only to the proviso contained in the assignment thereof, which Mrs. Corbett had made to him, which proviso was, that on Mrs. Corbett paying her bond of \$2,000, executed to him, with the interest on the same, the said assignment to Strang should be void.

These papers indicate to me, in the absence of all other evidence, that the defendant owned the bond and mortgage, subject to the assignment of them held by Strang, or had some other personal interest in the moneys that might be collected on them over and above what might be required to pay Strang.

Hence his personal undertaking to repay the \$1,750 first borrowed. Hence the last agreement states, not that Mrs. Corbett

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had assigned the bond and mortgage, but that he had caused them to be assigned. An assignment from both her and Strang was essential to a full assignment. If the agreement of July 26, 1847, imports that the defendant obtained the money and contracted as principal, then it follows—inasmuch as by a reference to the previous contracts, whatever may be the effect of that of July 9th, standing alone, it appears, that on the 10th of October, 1846, the defendant acknowledged himself personally indebted for \$1,750, of this \$4,000, and that he continued thus indebted, until he recovered the balance of the \$4,000—that the contract of July 26 creates, *prima facie*, no other liability as to the whole sum lent, than he had expressly incurred in respect to so much of it as had been lent prior to that date.

The paper of July, 1847, states, that defendant has received \$4,000, “bearing interest from the date hereof.” If the plaintiff simply purchased at his own risk, four thousand dollars in amount of the moneys owing on and secured by the bond and mortgage, this expression, “bearing interest from the date hereof,” is an inapt one to indicate the transaction. It is very clear that he did not take an assignment of four thousand dollars in amount, as a satisfaction of his advance. Because, no matter how large the amount due on them, he had a right to the whole proceeds, unless they exceeded his advance and interest. It is equally clear that he did not take the assignment out and out as a satisfaction of the sum advanced. For, if the proceeds amounted to more than the sum advanced, he was to pay the surplus to the defendant.

Hence it is evident that all the issues made by the pleadings are proved against the defendant.

1. It is incontestible that he personally received the \$4,000 from the plaintiff, and that it has not been refunded.

2. He says, “the said mortgage was received by said plaintiff in full payment and satisfaction of said sum.” This is disproved. The answer does not aver that it was advanced on an agreement of the plaintiff to take the risk of the proceeds of the mortgage being sufficient to reimburse the advance with interest, or to look exclusively to such proceeds for re-payment.

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3. He says in the answer, that he received those moneys "as the agent or attorney of Cathalina Corbett." This is denied by the reply. He gives no proof of the fact. The contracts of October, 1846, and July, 1847, which acknowledge the receipt of the moneys, are, in judgment of law, his contracts. They disclose no principal, nor do they intimate that the defendant had one.

In judgment of law, therefore, he received the moneys as principal, and on his own account. He is liable to repay them. He did not receive them as a gift, but as moneys bearing interest from the date of his receipt of them, and to be refunded with interest until paid. The bond and mortgage were assigned as security for their re-payment, and not upon any agreement of the plaintiff to advance the money and take the risk of realizing sufficient from the mortgage to reimburse himself. I cannot therefore resist the conclusion, that the ruling at the trial, on the evidence given, was correct.

What the position of the defendant would have been, if he had proved that throughout these transactions he had in fact acted as the agent of Mrs. Corbett, which fact was put distinctly in issue by the pleadings, and whether he could prove that fact in contradiction of the clear legal import of the agreements of October 10, 1846, and of July 26, 1847, it is unnecessary to undertake to decide. It is sufficient to say, that no evidence of such agency was given or offered, except such as appears on the face of the papers; and on and by the last two he appears and contracts as principal.

The answer does not allege that the plaintiff was guilty of any neglect in foreclosing the mortgage, that the market value of the premises was higher at any time between the 26th of July, 1847, and the day of sale, than on the latter day, or that they did not in fact sell for all they were worth, or that any trick or artifice was resorted to by the plaintiff to become a purchaser at less than their actual value.

I find nothing in the agreements to justify the conclusion that the plaintiff advanced his money on an agreement to look only to the assigned bond and mortgage for repayment. As to the \$1,750 first advanced, that was undeniably a loan; and an agreement of the borrower or of a person to whom money is

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advanced, to repay it out of, or to appropriate a particular fund to pay it, does not absolve him from his personal liability to refund. (*Cornwall v. Gould*, 4 Pick. 444-7; *Sterling v. Rogers*, 25 Wend. 658.)

The assignment of a mortgage as collateral security for the payment of a simple contract debt works no merger of the latter. (*Day & Penfield v. Leal & Leal*, 14 J. R. 404.)

As to the idea, that the assigned bond and mortgage were the primary fund for the repayment of the loan, that the defendant was merely a surety for its repayment, and that the plaintiff did not immediately foreclose the bond and mortgage, it is sufficient to say, that if such was the position of the defendant in this case, the neglect to sooner foreclose is no defence. There is no allegation that any injury was produced by the delay. If a surety, and not injured by the delay, he must pay the deficiency. (*Vide Schroepell v. Shaw*, 3 Coms. 446.)

The mortgage was to be foreclosed immediately. It has been foreclosed. It is not averred that it is or was in the power of the plaintiff to do anything in the foreclosure proceedings, which he has not done, that would have produced more than has been realized.

The bill of foreclosure states that Dikeman, the mortgagor, died in October, 1844, and that the whole principal was due, with interest from the 20th of November, 1846.

There is no allegation that Dikeman left any property at the time of his death. (See 1 R. S. 749, § 4.)

On the contracts signed by the defendant, and the other evidence given, I think it is manifest that the \$4,000 advanced by the plaintiff was lent by him; that it was advanced at the request of the defendant, that he acted as principal and on his own behalf in procuring the money, and that he is personally liable to pay the amount in arrear. It certainly does not appear that any part of the money was ever paid to Mrs. Corbett, or to any one by her order, or for her use.

But as a verdict was ordered subject to the opinion of the court at general term, and as it is obvious that all the facts of the case have not been disclosed, and as injustice might possibly be done by ordering a judgment on the verdict, I think it proper, under all the circumstances of the case, that a

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new trial should be granted on the payment by the defendant of the costs of the trial and of subsequent proceedings.

My brethren are of a different opinion, and think the verdict should be set aside and the complaint dismissed.

It seems to me, that unless the agreement of October, 1847, can be construed as an agreement to look solely and exclusively to the proceeds of the mortgage for reimbursement, the most that can properly be done is to grant a new trial. If that is not so clearly its legal import, that no parol evidence of the transaction can be given which would affect the rights of the parties, it would seem that inasmuch, as the court below held the evidence sufficient to entitle the plaintiff to recover, he ought not to be now turned out of court absolutely because he did not then give more. If the complaint is to be dismissed, it seems to me it must be upon the ground that no extrinsic proof is inadmissible to vary or explain the legal import of the written contracts; that by their necessary legal import they are not the contracts of the defendant, but of Cathalina Corbett, or if they are his contracts, that by them the plaintiff advanced his money and agreed to look solely and exclusively to the proceeds of the mortgage to obtain the repayment.

[Verdict set aside, and judgment for defendant dismissing complaint with costs.]

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An exception to the whole charge of a judge to a jury is too broad, and therefore bad, if any part of the charge be correct.

The case is not altered by making the exception to the whole charge "and each and every part thereof."

A conveyance of an undivided moiety of mortgaged premises, "*subject to the one half part of the mortgage*," does not create a personal obligation on the part of the grantee to pay one half of the mortgage debt.

The provision in the R. S. that "no covenant shall be implied in any conveyance of real estate," is to be construed as meaning that no obligation, covenant, or promise to do or pay anything shall be implied against either party to such conveyance, from the terms of the conveyance itself.

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But this construction is not inconsistent with the established rule, that either party to a conveyance is at liberty to show for any purpose, except to prevent its operation as a valid grant, that its true consideration was greater or less, and even wholly different from that which it specifies.

It follows, that evidence of an actual promise of a grantee to pay one half of a mortgage debt, subject to which the conveyance was made to him, is admissible, if, upon this promise, the deed was executed and accepted.

Evidence of such a promise is entirely consistent with the clause making the premises conveyed subject to one half of the mortgage debt; its sole effect is to enlarge the consideration expressed.

Nor is the statute of frauds, as excluding parol evidence of such a promise, applicable to the case.

While the agreement between the parties, which embraced the promise, was executory, it was binding upon neither, but when it was executed by the delivery and acceptance of the conveyance, the promise became valid and could be enforced.

As a general rule, when improper evidence has been admitted upon a trial, and an exception duly taken, a new trial must be granted, if the evidence had any bearing upon the issue, and could possibly have had an influence upon the verdict.

But when the cause is before the court upon a case containing the whole evidence, although it may appear that improper evidence was admitted, the verdict will not be disturbed if the court is satisfied that substantial justice has been done, and that excluding the improper evidence, the same verdict ought to have been and would have been given.

Held, by a majority of the court, that the same rule ought to be followed when the question arises upon a bill of exceptions, which purports to contain the whole evidence given upon the trial.

New trial denied, and judgment for plaintiff upon verdict affirmed.

(Before OAKLEY, Ch. J., PAINE and BOSWORTH, J.J.)

Nov. 18, 19, 1852; Jan. 29, 1853.

APPEAL by the defendant from a judgment at special term upon a verdict in favor of the plaintiff.

The action, which was commenced before the Code, was upon special promises, and the issues raised by the pleadings were tried before Mr. Justice Paine and a jury in November term, 1851. The suit was originally brought against Peter Smith, as surviving executor of the last will, &c., of Hugh Smith, deceased. Upon the death of the executor, the present defendant, Bartlett Smith, as administrator, with the will annexed, was made the defendant.

The first count of the declaration stated, in substance, that Hugh Smith, in his lifetime, in consideration that the plaintiff, Peter Murray, would convey to him in fee an equal undivided

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half part of certain lots of ground, particularly described, in the village of Williamsburgh, undertook and promised to keep the plaintiff harmless, and indemnified from all loss or damage, by reason of the one equal half part of the moneys due and to become due upon a certain mortgage upon the said lots, before that time executed by the plaintiff to one William P. Powers, to secure the payment with interest of the sum of \$1,204, on or before the 12th of November, 1838. That the plaintiff, relying upon this promise, conveyed to the testator on the 13th of December, 1835, the one equal half part of the said lots, subject to the one equal half part of the said mortgage; but that neither the said Hugh Smith, in his life, nor the defendant, since his death, had indemnified the plaintiff, according to the said promise and undertaking. It then averred that the plaintiff had duly paid the one half part of the mortgage debt which he was bound to pay, but that the other half part remaining unpaid, the holder of the mortgage instituted a suit in chancery for the foreclosure thereof. That a decree in that suit of foreclosure and sale was duly made, ordering the premises so conveyed to Hugh Smith to be sold for the purpose of satisfying the amount, with interest and costs, then due upon the mortgage; and further directing, that if the moneys arising from the sale should be insufficient to satisfy such amount, &c., the said plaintiff should be decreed to pay the amount of the deficiency. That a sale under the decree was accordingly made, and that there was a deficiency in the proceeds amounting to \$532 40, which sum the plaintiff had been compelled to pay, whereby he was damnified, &c.

The second count of the declaration differed only from the first in stating the promise of the testator, H. Smith, to be, not to indemnify the plaintiff, but to *pay to the owner and holder of the mortgage* one equal half part of the moneys due and to grow due thereon.

To these special counts the usual money accounts were added.

The defendant pleaded the general issue and the statute of limitations, and annexed a special notice, the contents of which it is not deemed necessary to state.

The following facts were proved upon the trial:

In October, 1835, Peter Murray bid off at auction eight lots

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of land lying in Williamsburgh, Kings county. Hugh Smith, the défendant's testator, was present at the sale, and Murray stated in his presence, on the same day, that they, Murray and Smith, were jointly interested in the purchase, which Smith did not deny. Pinckney, the lawyer who searched the title, made out his bill for the service against Murray and Smith; and, though his recollection was faint, "he thought that both of them spoke to him on the subject" of looking into the title and seeing the vendor. Considerable circumstantial testimony was offered, tending to show that Smith and Murray were speculators together in the purchase and sale of lands.

The eight lots were conveyed to Murray by William P. Powers, November 12, 1835, for \$1,725. And on the same day Murray gave his bond and mortgage to Powers for \$1,204, part of the consideration money, payable on or before November 12, 1838, with interest at six per cent. payable in the meantime, semi-annually.

The precise sum paid to Powers on the purchase was \$516.

Murray conveyed to Smith, December 13, 1835, in consideration of \$258, being one-half of the last named sum, one equal undivided half part of the eight lots, "subject to the one-half part of a mortgage of \$1,204, given by the said Peter Murray to William P. Powers," &c. Peck, the subscribing witness to this deed, who identified Murray before the commissioner, did not recollect that any money passed between the parties at the time.

Smith died in February, 1837. And afterwards, June 15, 1839, Murray paid to one William H. Smith, assignee of the Powers' bond and mortgage, \$602 in full, for half of the principal, and \$21 30 in full, for half of the interest due thereon.

W. H. Smith, the assignee of the bond and mortgage, filed a bill of foreclosure, September 10, 1839, for the balance due on his mortgage, against the one-half of the premises which had been conveyed by Murray to Hugh Smith, making Murray and the representative of Hugh Smith, defendants. That share was accordingly sold under a decree in that suit; the costs were first paid, and the residue applied to the mortgage debt. The deficiency was decreed personally against Peter Murray.

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The deficiency was \$532 40. The costs of foreclosure amounted to \$352 79. On September 30, 1843, Peter Murray paid the deficiency which had been so decreed against him.

Peter Murray claimed this deficiency, in due form, from the executor, who refused to pay or to refer.

Peter Murray was the purchaser at the foreclosure sale. Hugh Smith's eldest son, and the attorney and counsel for the executor, were present at the sale.

It was also proved that the assignee of the mortgage purchased it, accepted the payment of one half, and foreclosed and sold for the residue at the suggestion of the plaintiff. Upon the trial certain letters of H. Smith, the testator, were admitted to be read in evidence, which contained no reference to the purchase of the lots in question, but proved that he was jointly interested with the plaintiff in other similar purchases.

An affidavit of the plaintiff annexed to the claim exhibited by him to the executor of H. Smith against the estate, and swearing to its validity, was also allowed to be read in evidence.

To the admission both of the letters and affidavit, as irrelevant and immaterial, the counsel for the defendant duly excepted.

When the testimony on the part of the plaintiff was closed, the counsel for the defendant moved for a nonsuit upon the following grounds:

1. That by the deed from Murray to Smith, the equity of redemption only was conveyed for the consideration money expressed in the deed; that no covenant could be implied from such deed; that the provisions of the deed did not impose any obligation on Hugh Smith to pay the half of the mortgage, and that the testimony given in evidence by the plaintiff did not show any other consideration for that conveyance than such as was expressed therein.

2. That the alleged agreement of joint purchase upon which it was claimed that the deed to Murray was taken in his individual name for the benefit of himself and Hugh Smith was void, and could not enter into or form part of the consideration of the deed subsequently executed by Murray to Smith.

3. That the evidence introduced by the plaintiff, of the

transactions prior to the deed from Murray to Smith, if of any effect, showed a general partnership in trading in other real estate than the premises in question, and that this suit could not be maintained.

4. That the evidence did not support either count in the declaration.

The judge denied the motion, and the counsel excepted to the decision.

After the evidence on both sides was closed, the defendant's counsel requested the judge to charge the jury as follows:

1. That it was to be presumed from the deed from Murray to Smith, that the entire contract between the parties was contained in its provisions, and that all previous negotiations had been merged in the deed.

2. That the conveyance subject to one half the mortgage imposed no obligation, express or implied, on Hugh Smith to pay the one half of the bond and mortgage to Powers.

3. That there was no evidence in the case of any agreement to indemnify the plaintiff from the one half of the bond and mortgage to Powers.

4. That the plaintiff could not recover upon any of the common *indebitatus* counts.

5. That whatever were the considerations existing at the date of the deed from Powers to Murray, the legal result of that transaction was to determine any subsisting interest of Hugh Smith in the premises conveyed by that deed.

6. That the mutual covenants and agreements in the deed from Murray to Smith, repel any presumption that any other considerations or agreements existed between the parties in relation to the transaction than such as were expressed in the deed.

7. That the Statute of Limitations ran against the alleged promise to pay one half the bond and mortgage.

8. That the plaintiff was not entitled in any event to recover the entire amount of the deficiency on the foreclosure sale, but that the amount of the costs of the foreclosure suit, in any event, should be deducted.

9. That the agreements on the part of Hugh Smith, con-

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tained in the deed from the plaintiff to him, were binding on him, although he had not signed or sealed the deed.

But the judge refused to charge the jury as requested by defendant's counsel in the said several first, third, sixth, seventh, and eighth of said several propositions, or any of them, to which several refusals defendant's counsel excepted.

The judge, in his charge, submitted it to the jury to determine whether they were satisfied, from the evidence, that the promise set forth in the second count of the declaration had, in fact, been made by the testator. If they were so, he directed them to find a verdict for the plaintiff for the sum that was claimed.

To which charge, and to each and every part thereof, the defendant's counsel excepted.

The jury found a verdict for the plaintiff for \$794.¹¹/₁₀₀.

The cause now came before the court upon a bill of exceptions, embracing all the evidence given, and all the exceptions taken, upon the trial.

J. Van Buren, for the defendant, supported the demand for a new trial upon the following grounds and authorities:—

I. The judge erred in admitting parol testimony of any negotiations or transactions, between the plaintiff and Hugh Smith, prior to the 13th day of December, 1835 (the date of the deed from Peter Murray to Hugh Smith), as they were irrelevant and immaterial, and were incompetent either to enlarge, vary, or explain the contract evidenced by the deed, or to show any agreement, relating to the bond and mortgage to Powers, not contained in the deed. 1. The legal construction and effect of the deed, was to convey one half the premises, subject to the lien of one half the Powers mortgage, without imposing upon the grantee any personal obligation to assume or pay one half that mortgage. (*Tillotson v. Boyd*, 4 Sand. S. C. 416; 1 R. S. 738, § 140; *Culver v. Sisson*, 3 Com. 266.)

Its legal expression, in the absence of other written evidence, was, that the grantee assumed the obligation thus defined, and none other. (*La Farge v. Rickert*, 5 Wend. 157; *Cleery v.*

Holly, 14 Wend. 30; *Mumford v. McPherson*, 1 J. R. 414; *Bayard v. Malcolm*, 1 J. R. 467; 2 Cow. & Hill's Notes, 1470.)

2. The special covenant of the grantee in the deed was obligatory on him as an agreement, although he did not sign the deed, and the written agreement, thus containing stipulations on the part of each party, merged all prior negotiations, treaties, or verbal agreements; it expressed the extent of the obligation intended to be imposed or assumed, with reference to this mortgage, and it was improper to show, by parol, any intent beyond that expressed in the writing, "*Expressum facit cessare tacitum*." (*Torrey v. The Bank of Orleans*, 9 Paige, 659; *Sinclair v. Jackson*, 8 Cow. 586; Story on Cont. § 11, 15; *Toussant v. Martinnant*, 2 T. R. 105; *Preston v. Merceau*, 2 W. Bl. 1249; *Van Nostrand v. Reed*, 1 Wend. 424; *Vandekarr v. Vandekarr*, 11 J. R. 122; *Howes v. Barker*, 3 J. R. 509; *Johnson v. Miln*, 14 Wend. 200; *Hunt v. Amidon*, 4 Hill. 346; *Niles v. Culver*, 8 Barb. S. C. 207.)

3. The parol testimony offered to show an equitable obligation on the part of Hugh Smith to pay one half the Powers mortgage, arising out of a subsisting responsibility as an original joint purchaser, or a title taken by the plaintiff on joint account, was in direct contradiction to the rights and obligations of the parties as expressed in the deed.

The plaintiff covenants, in the deed, that he was "lawfully seized in his own right of a good, absolute, and indefeasible estate of inheritance in fee simple," in the premises conveyed, and otherwise warrants the title.

This *estopped* the parties from claiming that the title was held in trust, on joint and equal account. (*Rathbun v. Rathbun*, 6 Barb. S. C. 98; *Sinclair v. Jackson*, 8 Cow. 586.)

And as the representatives of Hugh Smith are precluded from asserting any equitable rights growing out of any such prior relation between him and plaintiff, the estoppel is reciprocal.

II. The motion for nonsuit should have been granted, for the reasons urged on the trial.

No express agreement to pay one half the mortgage was shown, nor were there any circumstances proved from which an agreement to that effect is attempted to be implied, except

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the proof tending to show that the original purchase was on joint account.

1. There were no subsisting legal or equitable considerations, at the time the conveyance from plaintiff to Hugh Smith was executed, upon which an implied agreement of Hugh Smith to pay half the Powers mortgage could be predicated. (*Fowler v. Poling*, 2 Barb. S. C. 300; *Stafford v. Hill*, 2 Hill. 353; *Ehle v. Judson*, 24 Wend. 77.)

A. Any interest which Hugh Smith might have had in the original purchase was merged in the deed given, with his assent, by Powers, to the plaintiff alone, and no resulting trust existed in his favor; nor were there any existing rights which he could enforce, or which could be enforced against him. (*Padgett v. Lawrence*, 10 Paige, 171; *Brewster v. Power*, 10 ib. 569; *Lathrop v. Hoyt*, 7 Barb. S. C. 59; 2 R. S. 134, § 6; 1 R. S. 727, § 47, 49; *Smith v. Burnham*, 3 Sumner, 458.)

B. There was no evidence of what transpired between the parties when the deed from Murray to Smith was delivered, nor that any consideration existed or operated on either party, except those evidenced by the deed; or that they dealt together otherwise than according to the legal relation then subsisting between them.

The exception to the opinion and decision of the judge, upon deciding the motion for a nonsuit upon this point, was, for these reasons, well taken.

2. There was no count in the declaration under which the plaintiff was entitled to recover.

A. No recovery could be had upon the common *indebitatus* counts, alleging money paid, loaned, advanced, and an accounting had, &c., with Hugh Smith in his lifetime.

The indebtedness in this case, if any, was created by the decree against, and payment by, the plaintiff in 1843, five years after the death of Hugh Smith, and the granting of administration upon his estate. (*Stewart v. Eden*, 2 Caines' R. 121.)

B. Nor on either the first or second counts.

(a) The first count alleged that \$258 cash paid, and the promise to indemnify the plaintiff against the one half of the Powers mortgage was the price of the property sold.

No such promise was proved. A promise to indemnify

against a debt is a far different promise from one to pay it. (*Ex parte Negus*, 7 Wend. 499; *Thomas v. Allen*, 1 Hill. 145; *Churchill v. Hunt*, 3 Denio, 321.)

(b.) The second count alleged \$258 cash paid, and the promise to pay one half of the Powers mortgage, to be the price or consideration of the conveyance.

If any implied obligation existed on the part of Hugh Smith, there is an entire variance and misdescription of the consideration, as set out in either the first or second counts. (1 Chitty Pl., 326-7.)

The consideration moving from the plaintiff was not alone the conveyance, but also the covenants of warranty.

The obligation (if any) on the part of Hugh Smith, having reference to the pre-existing relations, claimed to have existed between him and plaintiff, was not alone to pay the half of the mortgage to Powers, but also half the lawyers' bills, and any other disbursements connected with the purchase; from which again, he was entitled to deductions for any moneys which might have been received by plaintiff on joint account. The right of either, if any existed, was to an accounting as joint tenants or tenants in common, and this is a clear case of an attempt to recover for one item of a copartnership account, or of an account between joint tenants or tenants in common, without showing either that it was the sole item (the proof being to the contrary), a balance struck, or any express promise to pay. (1 Chitty Pl., 7 Am. Ed. 44, and cases cited, notes 72, 73, 74.)

III. The judge erred in refusing to charge as requested.

1. "That it was to be presumed from the deed that the entire contract between the parties was contained in its provisions, and that all previous negotiations had been merged in the deed. All the authorities cited under point I. show that this presumption was a legal inference from the written contract.

2. "That there was no evidence, in the case, of any agreement to indemnify the plaintiff from one-half the mortgage to Powers." Though a payment of the principal debt might insure indemnity, yet indemnity was a very different obligation, which might well be effected without payment.

3. "That the mutual covenants and agreements in the deed from Murray to Smith, repel any presumption that any other

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considerations existed between the parties, in relation to the transaction, than such as were expressed in the deed."

The proof afforded by the deed, that Hugh Smith did not assume to pay half the Powers mortgage, was so strongly presumptive of the fact, that it could only be rebutted by express proof to the contrary. (*Tillotson v. Boyd*, 4 Sand. S. C. R. 416.)

IV. The judge erred in admitting as evidence to the jury,

1. The affidavit of Hugh Smith. It had relation to another matter occurring about a year subsequently, and had no connexion with this transaction.

2. The letters from Hugh Smith to plaintiff. They also related to other and subsequent matters.

3. The letter from T. C. Pinckney. As the plaintiff has only succeeded in convincing a jury of the existence of an obligation on the part of Hugh Smith, as a joint purchaser with the plaintiff, by the ingenious combination of scraps of testimony, the court cannot fail to see that the admission of either of these pieces of evidence must have had its weight with the jury; and, if either of them was improperly admitted, the defendant is entitled to a new trial. (*Farm. & Manu. Bk. v. Whinfield*, 24 Wend. 426; *Clark v. Vorce*, 19 Wend. 232; *Dresser v. Ainsworth*, 9 Barb. S. C. 619.)

V. A new trial should be granted, with costs to abide the event of the suit.

C. O'Connor for plaintiff, *contra*.

I. The acceptance of the deed by the defendant's testator was sufficient evidence of a promise, on his part, to pay the one half of the mortgage to Powers. (*Burdett v. Lynch*, 5 B. and Cr.; *Wolveredge v. Steward*, 9 Bingh. 60.)

II. If the words of the deed are in this respect obscure or doubtful, extrinsic evidence was admissible to elucidate their meaning. (*Bradley v. Washington Packet Co.* 13 Peters 97, 101, 103; *Cole v. Wendell*, 8 Johns. 116; *Walrath v. Thompson*, 4 Hill. 201.)

III. This was a suit for an ascertained sum paid by plaintiff to the use of the testator in the course of a joint speculation in lands.

1. The objection that an executory copartnership for the pur-

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pose of dealing in lands, is repugnant to the statute of frauds, has no application, after the titles to the lands are all settled by deed, as in this case. (*Smith v. Burnham*, 3 Sumner, 458; *Hess v. Fox*, 10 Wend. 440; *Griffith v. Young*, 12 East. 523; *Hall v. Hall*, 8 N. H. R. 131; *Barber v. Taylor's heirs*, 9 Dana, 87.)

IV. The circumstances of the case show clearly that the price agreed to be paid by the defendant's testator for the conveyance to him by Murray, was one half of the original consideration money; which includes, of course, one half of the mortgage.

1. The consideration clause of a deed has always been considered open to explanation, enlargement, or contradiction by oral evidence, for the purpose of giving efficacy to the conveyance, or of establishing any mere personal claim growing out of the transaction. (*Shepard's Touchstone*, 222; *Jackson v. Fish*, 10 J. R. 456, 16 J. R. 515; *McCrea v. Purmont*, 16 Wend. 460; *Groenvelt v. Davis*, 4 Hill, 647, 5 N. H. R. 82.)

2. The only limitation to this kind of proof, is, that it cannot be received to avoid the conveyance, or to defeat the title thereby created.

V. There is no ground for deducting the costs of the foreclosure.

1. If the mortgagor had sued Murray upon his bond, or foreclosed the mortgage against Murray's share of the lands, the latter would have had a right to insist, as against Hugh Smith's representatives, that Hugh Smith's share of the land should be first applied to the payment of the debt. (*King v. Baldwin*, 17 J. R. 390, 391, 393; 10 Wend. 162; 13 Wend. 176.)

2. In case of a suit at law upon the bond, Murray could have filed a bill to compel a foreclosure as against Hugh Smith's share, which would have been, in itself, substantially a foreclosure bill. The proceeding adopted was precisely to the same effect. (1 *Evan's Pothier*, p. 412; 2 *Comstock*, 229, 231, 234; 2 *Denio*, 45, 61; 9 *Paige*, 454; 1 *Cowen*, 513, 539, 540; 17 *Mass. R.* 173.)

3. The executor of Hugh Smith was bound to indemnify Murray against the balance due on the mortgage. He had a right to a credit by way of deduction, to the extent of the sum realized from the mortgaged premises; but the sum realized

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was the net proceeds of the mortgage sale, and not the gross proceeds thereof.

VI. The plaintiff is entitled to judgment upon the verdict.

By THE COURT. BOSWORTH, J.—This action was commenced prior to the enactment of the Code, and was tried in November, 1851. The questions presented to us for consideration arise upon a bill of exceptions taken at the trial, and are questions of law only. I am of opinion that the charge given to the jury was substantially unexceptionable, and that no error was committed at the trial, unless it was in refusing to nonsuit the plaintiff, or in the admission of evidence against the objection of the defendant.

An exception to the whole charge, and to each and every part thereof, is too broad, if any part of the charge be correct. It is the province of an exception to a charge at the trial to call the attention of the judge directly to the objectionable part, so that if there be error he may correct it at once. An exception to the whole charge is too broad, unless it is all wrong; and the addition of the words, "and each part of it," makes no difference. (*Jones v. Osgood*, Court of Appeals, April 16, 1850.)

The first question is, Was there sufficient evidence to justify submitting to the jury the question whether Hugh Smith made the promise stated in the second count of the declaration? The testimony shows that on the 22d of October, 1835, at a public sale at the Merchants' Exchange of a large number of Williamsburgh lots, the plaintiff purchased eight, as the highest bidder for the same, at prices amounting in the aggregate to \$1,720.

By the terms of sale, ten per cent. of the purchase money was to be paid down, the balance on the 12th of November, when deeds were to be delivered to the purchaser, who was to have the privilege of giving his bond and mortgage for seventy per cent. of the purchase money, at one, two, or three years, at six per cent. interest.

Subsequently, but on what day does not expressly appear, Powers, the owner of the lots, executed and delivered to Mur-

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ray a deed of them, dated Nov. 12, 1835, and received from Murray his bond, and also his mortgage of the same lots, conditioned to pay \$1,204, on or before the 12th of November, 1838, with interest semi-annually at six per cent.—the bond and mortgage both declaring that they were given to secure the payment of part of the consideration money expressed in the deed from Powers to Murray. The \$1,204 was seventy per cent. of such purchase money. The balance of such purchase, being \$516, was in fact paid by Murray to Powers on the 7th of December, 1835. I deem the date of this payment a significant fact in connexion with other evidence given. Whether Powers delivered his deed to Murray, and took from the latter his bond and mortgage, before or on this day, does not expressly appear. If before, then those papers were exchanged before any part of the purchase money had been paid. For the \$516, which included the ten per cent. payable on the day of sale, was not actually paid until the 7th of December. On the latter day, Murray executed and delivered to Hugh Smith a deed of an undivided half of the eight lots, which expresses its consideration to be \$258, being precisely half of so much of the consideration as Murray that day paid to Powers. The deed conveyed to Smith an undivided half of the eight lots, “subject to the one half part of a mortgage of \$1,204, given by the said Peter Murray to William P. Powers, on the said lots, the 12th day of November, 1835, with interest at six per cent. payable half-yearly.”

Smith and Murray were both present at the auction sale on the 22d of October, 1835, and stood near each other when the sale of the eight lots of ground was going on. Murray there stated to James Moore, in the presence of Smith, that Smith “was joined with him in the purchasing of said lots of ground on that day.” Smith expressed no dissent to the truth of this remark.

There can be no doubt that Moore speaks of a conversation had at this particular sale. The lots were sold by Mr. Franklin as auctioneer. Moore says Franklin was auctioneer at the sale of which he was testifying; that he himself bought in four lots, but did not complete his purchase; that he knows of no other sale in which Murray or Smith was concerned; and that both

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Smith and Murray purchased at that sale. Powers says that Moore bought four lots at that sale, but did not complete his purchase. I think the conversation of which Moore testified took place at the time of the sale and purchase of the eight lots in question. It appears that Powers made a statement relative to this purchase, in the form of an account :

Debiting Murray with the price	\$1,720
Crediting him with the amount of the bond and mortgage	1,204
	<hr/>
Striking a " balance to be paid " of	\$516

And also charging him for drawing the bond and mortgage, and the expenses of acknowledging and recording the latter, amounting to \$7 12 $\frac{1}{2}$.

There was evidence tending to show that this statement had been in the possession of Hugh Smith, and that he had written some figures thereon, but under what particular circumstances, or for what specific purpose, did not expressly appear.

It further appears that the deed from Murray to Hugh Smith, although dated the 13th of December, was acknowledged, and the county clerk's certificate of the official existence and signature of the person before whom it was made, was obtained on the 7th of December. They bear date on that day, and the deed was recorded on the 11th of December, two days prior to its date.

The subscribing witness to the deed testifies that he met the plaintiff and another gentleman in the street. Murray said he wanted a man as a witness, and he went with them to the office of Judge Ingraham, and testified to the identity of Murray. He saw no money paid at the time. This acknowledgment being made and certified, the certificate of the county clerk was obtained, and on the same day Murray paid to Powers all of the consideration, except that secured by the bond and mortgage of Murray. If in point of fact the bond and mortgage by Murray to Powers, and the deed from him to Murray, were not delivered before the thirty per cent. of the purchase money or any part of it was paid, then the evidence would be

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quite strong to show that the delivery of the deed from Powers to Murray, of the bond and mortgage of the latter to the former, and payment of \$516, the balance of the purchase-money, and the delivery of the deed from Murray to Smith, and payment by the latter of \$258, half of the portion of the purchase money that day paid to Powers, were contemporaneous transactions. It will be borne in mind that the consideration expressed in the deed from Murray to Smith is just one half of the part of the consideration money advanced in cash to Powers, and that the deed is by its terms made "subject to the one half part of the mortgage" given upon the eight lots to secure the balance of the purchase money.

It seems to me that the evidence was sufficient to justify the jury in finding that these lots were bought by Murray and Hugh Smith on joint account; that Smith advanced one half of the \$516 paid in cash, and took a deed of an undivided half of the lots thus bought on joint account, on a promise that he would pay one half of the unpaid part of the purchase money to the holder of the mortgage executed as security for the payment of it according to the terms of payment stipulated in the mortgage; that there was sufficient evidence, exclusive of any to result from the fact, that the deed by its terms conveyed the undivided half of the lots "subject to the one half part" of the mortgage.

The judge charged the jury that the deed from Murray to Smith imposed no obligation upon the latter to pay the one half part of the bond and mortgage. I do not understand the defendant to complain that this was not sufficiently favorable so far as the effect of the deed itself was concerned. Such a deed, executed since the Revised Statutes took effect, would not, alone and of itself, obligate the defendant to pay any part of such bond and mortgage. There is not any express promise to pay it found in the deed, nor any recital of the fact of such an agreement having been made contained in it.

1 R. S. 738, § 140, declares that "no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not." I assume that the fair meaning of this statute is that no obligation, covenant, or promise to do or pay anything shall be implied against either

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party to such conveyance, from the conveyance itself. If this be so, then it is obvious that the deed itself cannot *per se* be sufficient evidence of any promise not expressed in it to do or pay anything.

Though this be so, I think the law must be deemed to be settled in this state, that either party is at liberty to show for any purpose, except to prevent its operating as a valid and effective grant, that its consideration was different, greater, or larger than that named in it, and not wholly or at all pecuniary, in a suit by the vendor against the vendee to recover the actual consideration agreed to be paid, or in a suit brought by the vendee against the vendor on the covenants of seizin, or against incumbrances. (*McCrea v. Purmont*, 16 Wend. 460; *Bingham v. Weiderwax*, 1 Coms. 509; *Haverly v. Becker*, 4 Coms. 169.)

If the latter proposition be correct, then it follows that any evidence which legitimately tends to prove that the deed was executed and accepted on a promise by Smith to pay half of the mortgage from Murray to Powers was admissible. The opinion has been expressed that the evidence given was sufficient to justify the jury in finding that fact. If no improper evidence was admitted against the objection of the defendants, then the plaintiff is entitled to a judgment upon his verdict.

I do not think it follows that although the deed is not to be deemed of itself sufficient or any evidence of such a promise, therefore it is not to be admitted as evidence for any purpose. It is admissible to prove the fact of the conveyance of the land, and what interest in it was conveyed. If it recited the fact that it was made upon a promise of Hugh Smith to pay a half part of the mortgage in question, then, on proof that he accepted the deed, and entered under it upon the premises conveyed by it, the deed might of itself be sufficient evidence of the making of the recited promise. (*Torrey v. The Bank of Orleans*, 9 Paige, 649, 658-9; S. C. 7 Hill, 260.)

The clause, "subject to the one half part of the mortgage," is possibly consistent with the idea that Hugh Smith bought the equity of redemption of an undivided half of the lots, subject to an incumbrance upon them to the extent of half the amount of the mortgage without any promise to pay it, and

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that it was the understanding of the parties that it was optional with him whether he would pay it, or allow the lots to be sold to pay it, and that Murray was willing to sell in that way, taking the risk of the undivided half of the lots being at all times an ample security for the one-half of the mortgage which he was personally liable to pay. However this may be, the clause is certainly consistent with the fact, if not some evidence of the fact, that the deed was made, delivered, and accepted upon a promise of Smith to pay one half part of it.

There are cases which strongly favor the proposition that a deed containing such a clause as this, and executed under circumstances operating less strongly in aid of it, is evidence of, and virtually expresses a promise to pay the mortgage or encumbrance subject to which it declares itself to have been made. (*Wolveridge v. Steward*, 9 Bing. 60, Bosanquet, J.; *Minor v. Terry*, &c. 6 How. P. R. 211; *Jumel v. Jumel*, 7 Paige, 549–595.)

But conceding that it was neither an express promise, nor of itself evidence of a promise, to pay the mortgage, still no error was committed in any instruction given to the jury respecting it. The jury were substantially told that the deed imposed no obligation on Smith to pay one half of the bond and mortgage.

The statute of frauds has no application to the case. It may be conceded that while the contract remained executory, it was not binding on either party, yet when it had become executed, by a conveyance to Smith of his interest in the joint purchase, upon his promise to pay half of the original contract price, the promise could be enforced. (*Fish v. Dodge*, 4 Coms. 307–311.)

It needs no citation of authorities to show that a vendor, who has conveyed to a purchaser real estate sold, may recover from him the consideration agreed to be paid for the land so sold and conveyed.

For the reasons that have now been given, we all agree in the opinion that the motion for a new trial should be denied, if there was no error in the decision of the judge,—admitting as evidence the affidavit of Hugh Smith, the two letters from him to the plaintiff, and the letter of Mr. Pinckney to the plaintiff.

The affidavit was made in October, 1846, and showed that

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other land had been purchased of one Luther, in the name of Murray, on the joint account of himself and Hugh Smith; and that the latter was interested in such purchase to two thirds of its amount. It contained no allusion to the purchase in question.

One of the two letters was dated the 13th of January, and the other the 3d of February, 1836. They do not allude to this transaction; but tend to show an intimacy in business transactions between the two, and that Mr. Pinckney acted as the legal adviser of Murray, as well as of Smith.

The letter from Mr. Pinckney to the plaintiff, according to its terms, inclosed some small bills alleged to be against the plaintiff and Hugh Smith, requesting payment the next day. There is no evidence that Smith saw or knew of the contents of this letter.

This evidence was objected to by the defendant, as being inadmissible for any purpose, and the decision of the judge admitting it was excepted to. The correctness of this decision is raised by a bill of exceptions.

The plaintiff's counsel does not contend that this evidence is admissible for the purpose of showing that the purchase in question was made on joint account, or that the deed to Smith was made on his promise to pay one half of the mortgage as a part of the consideration agreed to be paid for the land.

But it is contended that it was competent to show the situation of Murray and Smith towards each other, that they had had business transactions with each other of a similar character, not with a view to establish this to have been a joint transaction, or that the deed to Smith was made and accepted on the promise alleged, but for the purpose of leaving the evidence tending to establish that the purchase was on joint account, and the making of the alleged promise, unimpaired in any respect by any such considerations, as that, if a joint purchase, it was, for aught that appeared, a transaction between entire strangers, and the only one that had ever occurred between them.

On the other hand, it is insisted that the evidence was not admissible for any purpose; that it might have influenced the jury in coming to the conclusion that this was a joint transaction, and that, on a bill of exceptions, the court is not at liberty

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to speculate upon the question whether the other party was prejudiced by the admission of improper evidence admitted against his objection, but that if it has been thus admitted, he is entitled to a new trial as a matter of strict right.

In *Marquand v. Webb* (16 J. R. 90), an incompetent witness proved a fact, which was fully proved on the trial by two other witnesses. The court said that "although the fact proved by him was proved by two other witnesses, we cannot say, the cause coming before us on a writ of error, that his evidence may be rejected as unnecessary." On this ground a new trial was granted.

In *Osgood v. Manhattan Co.* (3 Cowen, 612, 618), in the court for the correction of errors, it was held, that if improper evidence be given in the court below, though it be merely cumulative, the judgment will be reversed.

The court said: "It is well settled, that if improper evidence be given, although it be cumulative only, the judgment must be reversed: for we cannot say what effect such evidence may have had upon the minds of a jury."

In *Worrall v. Parmelee* (1 Coms. 519), the declarations of Brower, from whom both parties claimed to have purchased the property in controversy, were proved on the part of the defendant, to the effect that he had sold the property to the defendant. The plaintiff objected to this evidence, and excepted to the decision admitting it.

The plaintiff, in a subsequent stage of the trial, called Brower as a witness in relation to the sale, and his evidence tended strongly to show that he had sold the property to the defendant prior to the time when the plaintiff claimed to have purchased it.

The court said: "There are many cases which hold that an error in the court below, which, on its face and by legal necessity, could do no injury, is not cause for a reversal of the judgment. But where the error is in the admission of illegal evidence, which bears in the least degree on the question in issue, it cannot be disregarded."

There are cases, in which, although improper evidence was clearly admitted, the courts refused to interfere, on the ground

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that exclusive of such improper evidence, there appeared to be enough to sustain the verdict of the jury.

On examination, it will be found that those decisions were made in suits in which the question arose upon a *case* containing all the evidence, or in which the peculiar office of a bill of exceptions was inadvertently *overlooked*. (Cowen and Hill's Notes, 787-8.)

The sole object and end of evidence is, to ascertain the truth of the several disputed facts or points in issue, on the one side or the other, and no evidence ought to be admitted to any other point. As it is a rule of pleading, that the issue should be on a material point, so it is an essential rule of evidence, that the proof should be material and relevant to the issue. (1 Stark. Ev. 169.)

If it be conceded, as I think it must be, that the affidavit and letters were not competent evidence to prove the truth of any issue, for the reason that they did not tend to prove it, it is difficult to specify any ground on which they could be admitted for any purpose. They were given in evidence before the plaintiff rested. They were not introduced to explain any fact proved or evidence given on the part of the defendant. If their admission as evidence can be sustained, it must be for the reason that they are competent for the purpose of repelling some inference unfavorable to the plaintiff, which a jury might draw from his other evidence, or for the reason that they tend to prove some material issue. There is no ground for claiming the first part of the proposition to be true, unless the latter be also true. But they have no relation to the matters in controversy, and therefore are not admissible to aid in establishing the truth of the plaintiff's case.

There is no intrinsic improbability that such a transaction occurred, as the plaintiff alleges. Whether it did or not, is a matter of proof. It does not tend to establish the affirmative of the issue in this case, that another transaction of a like character had taken place between the parties, or that their business relations were intimate; nor can such evidence be given for the purpose of strengthening the evidence given to prove the alleged promise, or to divest it in any degree of any unsatis-

factory features which it may possess, or of any unfavorable inferences, with which it may be supposed a jury may justly regard it.

I deem this evidence inadmissible for any purpose. And although I should not have felt at liberty to disturb the verdict, if this evidence had not been given, yet having been given against the objection of the defendant, and an exception having been taken to the decision admitting it, and the questions as to the admission of it being raised by a bill of exceptions, the court, according to the decisions cited, have no discretion to exercise, in determining whether a new trial should or should not be granted. Unless a discrimination can be made between this case, and the cases of *Marquand v. Webb*, *Osgood v. The Manhattan Co.*, and *Worrall v. Parmelee*, the defendant would seem to be entitled to a new trial, as a matter of strict right.

The reason why the court will not always grant a new trial on a case, notwithstanding it appears improper evidence was given against the objection of the defeated party, and an exception taken to the decision admitting it, is, that a case is supposed to contain the whole evidence, and if the court of review is satisfied that substantial justice has been done, and that the verdict ought to, and would, have been the same, if the evidence excepted to had not been given, it will not disturb the verdict.

On the other hand, the theory of a bill of exceptions is, that it contains only so much of the evidence given as is necessary to properly raise the points sought to be reviewed on error, and therefore the court has not the means before it of accurately judging whether the objecting party may or may not have been prejudiced by the improper evidence, whose admission is complained of. It may, perhaps, be fairly claimed, that the bill of exceptions in this case contains all the evidence given. When the plaintiff rested, the defendant moved for a nonsuit on the ground, among others, "that the evidence did not support either count in the declaration."

A nonsuit was refused, and the decision of the court excepted to.

One of the points argued before us is, that the court decided erroneously in refusing to nonsuit. To properly present this

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question before us, it was indispensable that all the evidence given when the plaintiff rested, should be contained in the bill of exceptions. As it is drawn, it may be said, perhaps, that it purports to contain the whole of it, and also all that was subsequently given by the defendant. If it may be assumed that the bill of exceptions contains the whole evidence, then there would seem to be no good legal reason for not refusing a new trial on a bill of exceptions, if in the same case, and on precisely the same evidence, one would be refused on a case where the evidence was objected to, and the decision admitting it excepted to in the same manner in the one case as in the other.

Whether the court of last resort, to which an appeal can be taken on questions of law only, will countenance a practice, which may create the necessity of incorporating in the record the whole evidence, and of reviewing it, in order to determine whether improper evidence may or not have prejudiced the rights of the party excepting to its admission, it is unnecessary to attempt to conjecture. Unless it will do that, I cannot resist the conclusion, that the exception to the admission of the evidence in question was well taken, and that a new trial should be granted.

My brethren being of the opinion that under all the circumstances of this case, the verdict should not be set aside on account of the admission of this evidence, the motion for a new trial must be denied, and a judgment in the proper form entered in favor of the plaintiff on the verdict.

MORGAN v. BANK OF STATE OF NEW YORK.

A bank paying a check, payable to order, upon a forged endorsement of the payee, is liable for the amount, either to the payee or to the drawer, whose funds are so applied. If the check was the property of the payee, the bank is liable to him. If the check never passed to him by a delivery, and he had no interest in it whatever, the liability of the bank is to the drawer.

Such a check cannot be treated as payable to a fictitious person, or to bearer; but the payee, being a real person, the presumption of law is that it was drawn with the intent of vesting a title in him, and in him alone.

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Hence, it is only from the payee that a third person can derive a valid title. If the check never became the property of the payee, it is a necessary inference that it was obtained and put into circulation by fraud.

Held, upon these grounds, that the plaintiff was entitled to recover the amount of two checks, drawn by him and paid by the defendants, upon the forged endorsement of the payees.

Judgment accordingly.

(Before OAKLEY, Ch. J., PAINE and EMMETT, J.J.)

Jan. 20; Jan. 29, 1853.

THE plaintiff, by his complaint, demanded judgment for the sum of \$916 $\frac{2}{3}$, as moneys deposited by him with the defendants, and which, upon request, they had refused to pay.

The defence was, that the defendants had paid to the order of the plaintiff, upon two checks drawn by him, one dated April 29th, 1852, for the sum of \$291 $\frac{1}{4}$; the other dated May 3d, 1852, for \$445 $\frac{3}{8}$; the whole sum demanded by the complaint.

The cause was tried before Mr. Justice Duer and a jury on the 10th of November, 1852.

Upon the trial the plaintiff's counsel read in evidence the following stipulation, signed by the attorneys of the parties:—

This action being brought to determine the disputed question of the defendants' right to charge the plaintiff in account with the amount of two checks drawn by him upon the defendants to the order of G. W. Corlies & Co., one dated April 29, 1852, for two hundred and seventy-one dollars and four cents, and one dated May 3, 1852, for four hundred and forty-five dollars and eighty-eight cents, the endorsements upon which are alleged to be forgeries, it is stipulated by the defendants that they will admit upon the trial the deposit by the plaintiff with them of the sum of seven hundred and sixteen dollars and ninety-two cents, as averred in the complaint, and a request made of them by the plaintiff, before the commencement of this action, to pay him the said sum, and their refusal so to do by reason of their claim to charge him with such checks, and that at the time of such request, the said sum of seven hundred and sixteen dollars and ninety-two cents remained on deposit to his credit, unless he is properly chargeable with such checks. And the plaintiff stipulates to admit, for the purposes of this

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action, that if he is chargeable with such checks, he had no funds on deposit with the defendants at the time of such request.

The plaintiff thereupon rested.

The defendants' counsel then produced two certain checks, in the words and figures following:—

“No. 498.

“NEW YORK, April 29th, 1852.

“Bank of the State of New York.

“Pay the order of G. W. Corlies & Co., Two hundred and seventy-one $\frac{1}{8}$ Dollars.

“M. MORGAN.

“\$271 $\frac{1}{8}$.

(Endorsed)

“G. W. CORLIES & Co.”

“No. 519.

“NEW YORK, May 3d, 1852

“Bank of the State of New York.

“Pay the order of G. W. Corlies & Co. Four hundred and forty-five $\frac{1}{8}$ Dollars.

“M. MORGAN.

“\$445 $\frac{1}{8}$.

(Endorsed)

“G. W. CORLIES & Co.”

The plaintiff's counsel admitted that said checks were signed by the plaintiff, but did not admit that said checks had been endorsed by the payees thereof, and contended that the defendants were bound to prove the genuineness of the endorsements appearing thereon.

The presiding justice, however, ruled and decided, for the purposes of the trial, that in respect of the genuineness of such endorsements, the burden of proof was upon the plaintiff to show, that they were not genuine, to which decision the plaintiff's counsel excepted.

The plaintiff then called as a witness,

George W. Corlies, who, being duly sworn, testified as follows:—I am a member of the firm of G. W. Corlies & Co., which is composed of myself and Royal H. Waller, and was so in May and April, and up to first November. (Checks shown to him.) These signatures are not in the handwriting of our firm, or of any clerk thereof.

Cross-examined.—We never had any dealings with Matthew Morgan; he did not owe us anything; the checks were never in our possession, and were never delivered by anybody to us, or for our firm.

The jury, thereupon, by direction of the court, found a verdict for the plaintiff in the sum of seven hundred and thirty-nine dollars and ninety-one cents, subject to the opinion of the court, on a case to be made, with liberty to either party to turn the same into a bill of exceptions

W. M. Evarts, for plaintiff.

The judge upon the trial stated that he had no doubt of the right of the plaintiff to recover, and it was at the request of the counsel that he took the verdict subject to the opinion of the court. He said then all, that I deem it necessary to say now, that there was nothing in the case to prevent the application of the general rule; that a bank can only justify the payment of a check payable to order, by proving the endorsement of the payee, as well as the signature of the drawer, to be genuine. When either is shown to be forged, the bank must be liable to the person entitled to the funds wrongfully paid—generally the payee is the person so entitled—but the proof in this case establishes the right of the plaintiff. He therefore demands judgment upon the verdict.

A. W. Clason, jun., contra.

The issue to be tried was the forgery of the endorsements, and it was rightly held that the affirmative rested upon the plaintiff. I say rightly held, because the plaintiff is substantially the party averring the fact in dispute; because the person for whom the checks were drawn is a matter within his cogni-

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sance, and not within the cognisance of the defendant ; finally, because the checks bearing endorsements according to their tenor, and being paid by the defendants, the presumption of law is in favor of their being honest endorsements.

Banks are responsible for forgeries and alterations, but it would be as reasonable to require them to prove the sum in a check to be that originally written, as to prove the party to whose order a check is drawn.

The plaintiff proved by G. W. Corlies, that the endorsement was not that of his firm ; the defendants proved by the same witness, that the check was not theirs. So far there was no proof of forgery, but some proof of the payee being a fictitious person ; in which case the check was payable to bearer. (1 Coms. 113.)

If G. W. Corlies & Co. were the payees, as they had no interest in the checks, the holder and the bank had a right to treat the bill as payable to bearer ; or, if the check was given by the plaintiff to a third party, not G. W. Corlies & Co., the plaintiff thereby authorized him to endorse it, and is estopped from denying the genuineness of the endorsement.

BY THE COURT. PAINE, J.—Although no explanation was given upon the trial of the purposes for which the checks were drawn, nor of the circumstances under which they passed from the possession of the plaintiff; it seems to us, there is no reasonable ground upon which his right to recover in this action can be doubted. When a bill or check is payable to order, to justify the application to its payment of the funds of the drawer, it must be proved that the required order was in fact given—in other words, it must be proved that the endorsement was genuine—and the burden of this proof rests upon the person or bank upon whom the bill or check is drawn. Where the endorsement of the payee is shown to be forged, the payment of a check by the bank is in its own wrong, and can never be set up as a defence against the person whose rights it violated, or whose funds are misapplied. In all such cases, the bank must be liable to some person to the extent of such wrongful payment. If the check at the time was the property of the payee, it is to him that the bank is liable ; but if it had never passed into his hands, and he had no interest in it whatever—and such

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are the facts in the case before us—they are the funds of the drawer that have been misapplied, and which the bank is bound to replace. It is the plaintiff, therefore, who is entitled to maintain this action.

It is impossible for us to treat these checks as payable to bearer or to a fictitious person; as the payees are real persons, the presumption of law is, that the checks were drawn with the intent of vesting the title in them, and in them alone. Consequently, it was only from them that a title could be derived, and only upon a title given by them, and evidenced by their endorsement, that a valid payment could be made. As the checks were never delivered to them, and they were not the holders of them at any time for value, or otherwise, it seems to us a necessary inference that it was by the fraud of some third person that the checks were obtained and put into circulation. The loss resulting from this fraud the defendants must sustain, and against its perpetrator must seek their remedy.

The supposition that the plaintiff delivered the checks to some third person, to whom he gave an authority to put them into circulation by endorsing the name of the payees, is something worse than gratuitous. We reject it wholly—there is no proof of such a delivery, and the plaintiff could give no such authority—and, assuredly, we shall not impute to him, in order to protect the defendants, the design of enabling a third person, by means of a forgery, to effect a fraud.

The plaintiff must have judgment upon the verdict.

PARSONS v. TRAVIS and the MAYOR, &c., of New York.

The court will not restrain the erection and continuance of a lamp-post and lamp in front of or near a dwelling-house, upon the ground that it is a nuisance to the owner or inhabitants, unless the fact that it is so is clearly established by the proofs.

Whether such an erection shall be permitted or continued, rests in the discretion of the corporation of the city, and when no special injury is shown, the court has no right to restrain the exercise of this discretion.

Judgment dismissing complaint affirmed with costs.

(Before CAMPBELL, BOSWORTH, and EMMETT, J.J.)

Dec. 6, 1852; Feb. 26, 1853.

Parsons v. Travis.

THIS was an appeal, by the plaintiff, from a judgment at special term, dismissing the complaint with costs.

The following is an abstract of the pleadings:—

The complaint alleges that the plaintiff is the owner of the house and lot No. 8 Barclay street, in the city of New York; that the house is twenty feet wide on first story, and twenty-five feet wide on the second story; that attached to the house is a vault twenty-five feet wide, built under the side-walk; that between this house and No. 10 Barclay street, there is an alley-way ten feet wide, half under each house, running back the whole length of the lots; that the vault extends to the centre of the alley-way; that the plaintiff's house is intended for a store on the first story, and a dwelling-house in the upper part; that the defendant, Travis, has put down a lamp-post in the street, so sunk as to be two feet and a half within the extreme line of the plaintiff's side-walk (supposing it to extend to the centre of the alley-way), that in sinking the lamp-post, the plaintiff's vault was injured; that the lamp is so constructed as to be an annoyance and injury to his house; that plaintiff is injured two hundred dollars a year in the rent of the upper part of the house, the tenant being willing to pay that much more if it is removed; that the lamp is lighted nightly; that it is not required in the street; that the defendant Travis justifies himself by the alleged permission of the Corporation, &c.

Asks for an injunction order, *pendente lite*, against lighting the lamp, &c., and for a final judgment of removal, &c.

The answer of the defendant Travis denies that the boundaries of No. 8 Barclay street extend to the location of the lamp-post. Alleges that the Messrs. Meeks own the fee of the alley-way, and that they have given permission to the defendant, Travis, to put the lamp-post down. Denies any injury to the plaintiff's vault in sinking the lamp-post, or any injury to the plaintiff's property in any way, by reason of its being put down. Alleges that it is benefited by it; alleges also that the plaintiff's house is a gambling house, &c.; that the lamp is a public convenience, and that besides the Messrs. Meeks, the agents of the Corporation have assented to the lamp-post being put down, &c.

The reply of the plaintiff alleges mainly that David Hosack was the original owner of Nos. 8 and 10 Barclay street, and of the

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alley-way and premises in the rear; that he fashioned the premises in their present form; that they have remained so for twenty-five years and upwards, and denies generally all allegations of new matter in the answer.

The Corporation demurred generally to the complaint for want of equity.

The cause was heard before Mr. Justice Campbell, upon the issues of fact and of law, upon the 13th of November, 1851, and upon the 24th of January, 1852, he dismissed the complaint as to all the defendants with costs.

The learned judge made and caused to be filed the following statement of the grounds of his decision:—

“I found in this case that the alley-way mentioned in the pleadings and evidence, belonged to Meeks, the landlord of defendant Travis, that the lamp-post in question was put down by the defendant Travis, by and with the consent and permission of Meeks and the Corporation, which consent and permission they had a right to give. That the plaintiff had been, by himself and his grantors, for more than twenty years in undisturbed possession of the vault mentioned in the pleadings and evidence, but I considered that such enjoyment of the vault so far as the same extended under the front of the alley-way in question, gave to the plaintiff simply an easement, and carried no right to the surface of the street or side-walk; I further found that the lamp and lamp-post were not a nuisance.

“On the trial and argument of the case, it was agreed by the respective counsel, that the demurrer interposed by the Corporation should be treated and considered as a general demurrer.

“I thereupon decided, that the plaintiff did not show a right to have the lamp-post removed, and that he could not in this suit recover any damages, and I ordered the complaint to be dismissed as to all the defendants with costs.

“WILLIAM W. CAMPBELL.

“To the several conclusions of law above contained and decided the plaintiff’s counsel then and there duly excepted.

“W. W. C.”

Parsons v. Travis.

The case was now heard upon the pleadings, proofs, and exceptions.

J. Graham, for the plaintiff and appellant, insisted that the judgment ought to be reversed upon the following grounds:—

I. It was not necessary to show pecuniary damage to entitle the appellant to a judgment for a perpetual injunction order against the lamp and lamp-post in question, or for judgment of removal, &c. If it can be seen that Travis intended to do him an injury, or that such is the inevitable result of Travis's act, an injunction order is proper. The highest office of an injunction is prevention, and prevention in time, before injury.

The rule of the "Code" as to irreparable injury, &c., means injunction orders, made *pendente lite*. Code, § 219.

This case is analogous to an application for judgment restraining the use of a trade mark. Show the fact, the violation of right, and damage is matter of presumption.

II. If the court can see no good reason for Travis sinking the lamp-post (its unusual construction, and its not being ostensibly connected with his business being unexplained), it is bound to infer that it was intended to injure or annoy the appellant, particularly when such is its necessary or unavoidable effect. (*The M. & H. R. R. Co. v. Archer & Ors.*, 6 Paige, 83; *Gatlin v. Valentine*, 9 id. 575.)

III. It is perfectly immaterial in whom the fee of the sidewalk in question vests or resides, whether in the Corporation, the Messrs. Meeks, or the appellant; as a part of the public highway or street, it is under the control of the Corporation, to be controlled only for the public benefit and public use. Whether the Corporation is to be looked upon as controlling its own property, or merely exercising a fiduciary right of control over the property of another, the use or appropriation in every instance is or must be the same, *i. e.* for the benefit of the public. The Corporation is a public body, existing for public purposes. For its rights over the streets of the city, see *Drake v. H. R. R. Co.*, 7 Barb. S. C. R. 508; as illustrative of this principle, see *State of N. Y. v. City of Buffalo*, 2 Hill, 434; *Hodges v. Same*, 2 Den. 110; *Adriance v. The Mayor, &c.*, 1 Barb. S. C. R. 19; *Lawrence v. The Mayor, &c.*, 2 id. 577;

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Brown v. Same, 3 id. 254; *Halstead v. Same*, 5 id. 218, S. C. in error, 3 Comst. 430; *Reynolds v. The Mayor, &c. of Albany*, 8 id. 597.

IV. If the fee of the side-walk in question vests in the appellant, he is entitled to maintain his action on both or one of two grounds, viz. :

1. Because putting down the lamp-post was a permanent appropriation of his fee below the surface. The surface is alone subject to the public use.

2. Because of the annoyance or discomfiture necessarily occasioned to the appellant, or the occupants of his property, by light reflected from a lamp, constructed as the one in question.

If the lamp-post is offensive to the eye, why is he not entitled to the removal of it?

V. The appellant is the owner of the side-walk for the width of twenty-five feet up to the centre of the alley-way. The deed from Dr. Hosack conveyed the house and lot No. 8 Barclay street, "with the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining," in fee, a fee in every particular of the grant.

Was not the vault a tenement?

For "tenement" see 2 B. Blacks. Coms. 16, 17.

If the vault was granted in fee, the grantee took the same estate in every necessary incident as in the thing granted.

For presumptions as affecting grants, see 2 Ph. Ev. (Cow. & Hill's Ed.) 303, 304, notes; 4 Kent's Coms. 466-469.

Again,—The vault merged the fee of the soil. The soil was dedicated to it. It appropriated the entire beneficial use of the soil. The land is capable of little or no beneficial use besides. Although such a thing can exist as one person owning the surface of the soil in fee, and another owning an estate in fee above or below the surface (*Humphries v. Brogden*, 12 Adol. & El. 738; S. C. 64, E. C. L. R. 738), it is not to be implied—in must be created by express grant. If left to itself, the law will presume against a complication of estates in fee.

VI. Although the deed from the heirs of David Hosack to the Messrs. Meeks purports to convey the alley-way, bounding in front on Barclay street, that does not carry the fee in the land to the centre of the street; for the fee of that part of the

property had already been attached to the vault of No. 8 Barclay street, and passed as an incident of the grant of that property. This latter grant being antecedent to the former, the heirs of Hosack could make no larger grant than he could, or could convey no right but what he could. The case, therefore, on this branch of it, is to be looked at with reference to what Hosack could have granted to the Meeks, if he and not his heirs had executed the deed to them. He fashioned the premises Nos. 8 and 10 Barclay street, with these vaults extending to the centre of the alley-way, and his heirs are estopped by his acts.

Can it be said that he intended to reserve any interest in the soil below the vault, or between the arch and the flagging of the side-walk? Can it be supposed that he had such a thing in his mind when he first deeded to Townsend? Or can it be supposed that he did not consider the fee entirely appropriated or dedicated to the vault? If it can be seen that the intention of the party is narrower than the presumed effect of his act, intention may prevail, but is it so here?

The deed then from the heirs of Hosack to the Meeks abutted the alley-way upon Barclay street as a space and not as a line. (*MacLachlan v. Hammond*, 1 Sand. S. C. R. 323.)

It is not disputed that Barclay street is within that section of the city where the fee of the streets does not vest in the Corporation. (19 Wend. 659; Laws of N. Y., Webst. Ed., Vol. ii., p. 92; Laws of N. Y., Webst. & Skin. Ed., Vol. v., p. 125.)

This street was laid out in 1763, and the old common law rule of "*usque ad medium filum viæ*" applies. (20 Wend. 96.)

VII. Even if the fee of the side-walk vests in the Messrs. Meeks, and their permission to Travis to put down the lamp-post was sufficient—if it was not put down for a legal, useful purpose—the appellant is entitled to have it removed; a mischievous exercise of a right is not tolerated. (*Lasala v. Holbrook*, 4 Paige, 169.)

Even if the lamp-post was connected with Travis's business (and there is no proof or pretence of such a thing in the case), the keeping of a "pistol gallery" is illegal, and the lamp-post, as connected with such a business, must fall also. (*Tanner v. Trustees of Albion*, 5 Hill, 121.)

VIII. Under any circumstances the appellant was entitled

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to a judgment for the damage done to this vault in sinking the lamp-post. The proof was sufficient to show and sustain a claim for some damage.

The defendant, Travis, knew who it was he employed to sink the post, and could have produced whoever it was to show that no injury was done to the vault. The better proof was with him. Enough was shown to put him on his defence as to the fact. He offered no proof on the point, and so conceded it.

Justice Campbell does not question the sufficiency of the proof, but excluded it entirely from consideration. In this he erred. All the rights of the parties, as connected with the sinking of the lamp-post, the right to put it there, the damage done to the vault in sinking it, &c., should have been (certainly ought to be) finally and definitively passed upon in the present action.

IX. The Corporation and their agents were a necessary, certainly a proper party to the action. The complaint, in one aspect of it, savored of the old "bill of peace," and was intended to prevent a substantial disappointment of the objects of the action by the Corporation, through its agents giving a permission to some one else to maintain the lamp-post, which might have been the case had Travis sold it, or surrendered the permission given to him. Without the Corporation and its agents, as parties, the action would have reached Travis alone, when the prayer for judgment in the complaint shows a desire to avoid a multiplicity of suits by determining the right of the Corporation, under the circumstances, to give permission to Travis or any one else.

In other words, the object of the action was to try or test the right of the Corporation to give the permission to Travis to put down a lamp-post for his own private purposes, to the annoyance or injury of the appellant or any one else, and the right of Travis to act upon this permission; and also to recover against Travis the value of the injury done to the appellant's vault, an item of claim growing out of his act and therefore confined to him.

X. By their demurrer, the Corporation and their agents admit the whole of the appellant's case as alleged in his complaint, the loss of rent, the injury in other respects to the appel-

lant's property ; that they have been applied to to remove the lamp-post ; that it is unnecessary, an obstruction in the public street, &c., &c. The demurrer as to them should have been overruled with costs, or final judgment pronounced against them. No one will pretend, no matter what control they are entitled to over the public streets, that they have a right to appropriate any part of them permanently to one individual at the expense of another, when they know too, that not only the individual complaining, but the public generally, are or must be interfered with in their enjoyment of the streets. Yet this is what these defendants have virtually brought their case to by their demurrer.

The court may, in its discretion, still allow them to plead over, on terms. (Code, § 172.)

XI. Any recovery against the defendant, Travis, entitles the appellant to costs.

A. J. Willard, for respondents, contended that the judgment ought to be affirmed, and insisted that,

I. The *locus in quo* was not the soil and freehold of the plaintiff, so as to enable him to maintain an action for trespass upon it.

1. The lamp-post was erected in Barclay street, in front of premises belonging to the defendant's, Travis, lessor.

2. The fee of the land covered by the streets in the lower portion of the city of New York, of which the present street is one, vests in the owner of the adjoining property, subject to the easement belonging to the public.

3. The plaintiff therefore, never having been seized of the *locus in quo*, cannot maintain an action of trespass.

II. The plaintiff has not been disturbed in any easement or right of enjoyment connected with the premises owned by him.

1. The erection of lamp-posts and lamps is incident to the easement enjoyed by the public in the highway ; and if any one has a right to complain, it is the public alone. (*Drake v. Hudson River Railroad Company*.)

2. A lamp-post, erected or permitted to be erected by the public authority, is a lawful use of the highway, and does not create a nuisance, either public or private.

3. A lamp is not *per se* a nuisance, whether lawfully or unlawfully erected in the highway, for which any private citizen can complain. The law cannot take notice of those considerations that render a less degree of conspicuousness desirable for the plaintiff.

4. There is no evidence in the case that the lamp was a nuisance, or in any respect injurious to the plaintiff.

5. The plaintiff's occupation of the vault was not an easement, but a mere tenancy at will, determinable at the will of the owner of the fee; and, consequently, he cannot maintain an action for an act done under authority from the owner in fee.

III. The plaintiff is not entitled to recover damages for any injury to the vault.

1. The complaint does not lay the foundation of any such claim.

2. The only evidence tending to show an injury to the vault, is contained in the testimony of Gilbert Giles, who saw nothing but the appearance of a brick having been replaced for some cause in the inside of the vault, long after the lamp-post had been erected, and who did not, and could not know for what reason it had been replaced.

3. The court having found upon this evidence that there had been no injury done to the vault, that finding cannot be disturbed. (*Osborn v. Marquand*, 1 Sand. S. C. R. 457.)

IV. The plaintiff is not entitled to an injunction that would interfere with the control over the public streets, that the Corporation are invested with by law.

BY THE COURT. BOSWORTH, J.—The lot and premises, No. 8 Barclay street, as well as the lot and premises, No. 10 Barclay street, are conveyed by metes and bounds. Each is twenty feet wide in front, on Barclay street, and no more. Each lot extends southwardly of the same width, the length of the strip of land or alley-way lying between these two lots. The alley-way is ten feet wide. The fee of the alley-way, and of the premises in the rear, is not in the plaintiff, but in Meeks. The most that the owners of the lots 8 and 10 Barclay street can claim, under their deeds, is the right to an undisturbed use of

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the whole vault in front of their buildings, and to have the second and upper stories of the present buildings, and of any new buildings to be hereafter erected, overhang the alley-way; and that the alley-way shall be used as such, or for a purpose, which will not interfere more than such a use of it would, with the enjoyment of their premises.

Travis, by permission of the owner of the alley-way, and of the Corporation of the city of New York, has erected a lamp-post, surmounted with a lamp, within the limits of the alley-way, and near the curbstone of the street.

The object of this action is, to obtain a judgment of the court, that this lamp-post be removed; that Travis be perpetually enjoined from placing the same or any other within the limits of this alley-way; that the other defendants be "perpetually enjoined" from placing any lamp-post within these limits, designed as and for a private lamp-post, without the assent of the owner of lot No. 8, Barclay street, and also from directing or assenting that the lamp-post in question be kept there without the assent of the plaintiff, or other owner of the premises.

All other relief prayed is subordinate to and dependent upon the right of the court to grant this.

Unless the plaintiff has a strict legal right, which is invaded by the erection and continuance of this lamp-post, this action cannot be sustained. No special damage is shown to have resulted from it. It is not proved to be in fact an annoyance, and of course is not proved to have been erected with intent to annoy him.

The complaint alleges that it is a serious annoyance to the present occupants, and to all in-goers and out-goers, and a material injury to the value of the plaintiff's property, and as he believes an impediment to the leasing it to advantage, and he believes it was intended by Travis to vex and harass the plaintiff and his tenants.

This is expressly denied by the answer, and no proof was offered to establish the truth of the allegations.

No facts are alleged, from which, if proved or admitted, the court can see, that it is or might be injurious, except the averment that it is "evidently so constructed as to reflect the light with full force upon the street door or entrance to the upper

part of the plaintiff's house, making it unduly and unpleasantly conspicuous, and interfering with the comfort of the occupants and others passing in and out."

The answer denies that it was intended or so constructed as to effect this result, or that the alleged conspicuousness of plaintiff's house, or any interference with the comfort of the occupants and others passing in and out, result from it.

There is no proof of the truth of these particular allegations, unless the court can say judicially, that a lamp of the form, size, construction, and with the number of lights belonging to this, *prima facie* must work such consequences, and be presumed to have been constructed with such an intent.

The court, as I apprehend, will find it difficult without proof to say how the owner of a house can be injured, by having all the light thrown upon it, at any and all hours of the night, which can be furnished by a lamp of six burners. The mere fact of a residence or place of business being conspicuous cannot *prima facie* be deemed injurious. Nor can the fact, that it is very light in front of it after dark, be deemed prejudicial to its business, if lawful, as that of the plaintiff and his tenants must be presumed to be, as nothing to the contrary is shown by the evidence. There was no such evidence as would justify a jury in finding, that the displacement of the brick in the vault was occasioned by the erection of the lamp-post. The plaintiff did not call a witness to prove its condition at or prior to the time of erecting the lamp-post.

It is alleged to have been erected in October, 1850. The witness who proved that under the lamp-post was a hole about the size of a brick, swears to what he saw when he first examined the vault, which was about a year after the lamp-post was erected.

How and when this hole was made he does not attempt to state.

It would seem to be clear that Travis, having the consent of the owner of the alley-way and the permission of the Corporation of the city of New York to erect the lamp-post, had a strict legal right to erect it.

The court that tried the cause, found as matter of fact that it was not a nuisance. There is no evidence justifying the infer-

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ence that it was an annoyance to the occupants of No. 8 Barclay street, or any injury to the premises. The complaint was therefore properly dismissed as to Travis.

The city Corporation and its officers are made parties to obtain a judgment as against them, restraining them from hereafter permitting any lamp-post to be sunk within the limits of the alley-way, and from directing or consenting to the existing one being kept where it is, without the assent of the plaintiff, or other owner of the premises, No. 8 Barclay street.

The court will not undertake to regulate in advance, the future exercise of discretion, by the body or officers to whom the regulation and superintendence of the lighting of the streets, are confided by law.

The complaint alleges that the lamp "is not required in the street," but does not aver that it does not tend in any respect to promote the public convenience. It does not allege that "the commissioner of streets and lamps," or "the superintendent of lamps and gas," did not deem it useful to the public, or give permission to erect it, with a view to any such consideration.

Admitting all the averments in the complaint, which can properly be regarded as allegations of fact, to be true, it would not authorize the court to interfere with the action of these municipal officers, in this particular instance, in permitting the erection of this lamp-post.

They had a discretion to exercise in the matter, and although the court may have the power to review and control the exercise of this discretion in cases that may be supposed, there is not enough stated in the complaint to justify us in interfering in this instance.

We are of opinion that the judgment appealed from should be affirmed with costs.

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When an injunction is directed to a corporation, it is operative and binding, not only upon the corporation itself, but upon every person whose personal action, as a member or officer of the corporate body, it seeks to restrain or control.

Every such person is as fully bound to personal obedience, as if personally named in the process, and, consequently, is just as liable for his disobedience.

Upon any other construction, an injunction addressed exclusively to a corporation, would be a nugatory and senseless proceeding.

Quere: Whether the omission to serve with an injunction, a copy of the affidavit upon which it was issued, is such an irregularity as releases the party, upon whom the service is made, from the duty of obedience?

The service of a copy of the sworn complaint or other affidavit upon which an injunction, directed to a municipal corporation, is founded, is properly made upon the mayor, as the chief officer, and for that purpose, the representative of the whole corporation.

The service thus made is sufficient and effectual, as to every member of the corporate body whose personal action, as such, the injunction is designed to control.

When the injunction forbids the performance of a corporate act, it is violated by every member of the corporate body, by whose assent or co-operation, the act so forbidden is performed,

Every such member is, therefore, individually guilty of a contempt, for which as an individual he may be justly punished.

An injunction which forbids a corporation to make a particular grant, which it describes, is violated by the passage of an ordinance, or resolution, as a corporate act, which by its terms is meant to operate as the grant which is prohibited.

Every member, therefore, of the corporate body who votes for the adoption of such an ordinance, with the intent that it shall become operative and effectual as a grant, commits a breach of the injunction, and, if the process is valid, is guilty of a contempt.

The only defence that can be set up in such a case is, that the injunction upon its face was null and void, from the entire want of jurisdiction in the court by which it was issued.

No such want of jurisdiction can be alleged to exist where the injunction imposes a command, which the court, under any circumstances and upon any grounds, might rightfully address to the corporation and its members.

When the jurisdiction exists, although the allegations in the complaint may be wholly insufficient to warrant its exercise, the injunction must be obeyed.

This insufficiency is evidence of a want of equity in the complaint for which the injunction may be dissolved, but is no evidence of a want of jurisdiction, rendering the process void and justifying disobedience.

The denial of the jurisdiction of the superior court to enjoin the corporation of the city from making a particular grant by ordinance or otherwise, is a denial of

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the power of a court of equity of general jurisdiction, under any circumstances and upon any grounds, to restrain a municipal corporation in the exercise of its discretionary powers.

There is no distinction between a municipal corporation and any other corporation aggregate, in respect to the power of a court of justice over its proceedings. A municipal corporation cannot be excepted from the general provision in the constitution of the state which declares, that "All corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons."

A court of equity has no right to interfere with or control the exercise of a discretionary power, by substituting its own judgment for that of the party in whom the discretion is vested.

It will not interfere, therefore, when the discretion is exercised within its proper limits, for the purposes for which it was given, and from the motives by which those who gave the discretion meant that its exercise should be governed.

The court, however, is bound to interfere whenever it has grounds for believing that its interference is necessary to prevent abuse, injustice, or oppression, the violation of a trust, or the consummation of a fraud.

Hence,—If the corporation of the city of New York has no power to grant to any person the privilege of establishing a railway in any of the public streets of the city; or, 2nd—such a railway, if established, would operate as an injurious monopoly; or, 3rd—would be a public nuisance; or, 4th—there are reasons for believing that the grant is about to be made from corrupt motives, the issuing of an injunction to forbid the grant, is not an interference with a legal discretion, but a proper and necessary exercise of jurisdiction.

Held—Upon these grounds, that an injunction directed to the defendants, which commanded them not to grant to Jacob Sharp and others the privilege of constructing a railway in Broadway, was properly granted, and that those members of the common council, who, after the service of the injunction, had voted for an ordinance or resolution, making the grant that was prohibited, were guilty of a contempt for which they were liable to be attached.

Municipal corporations possess only such powers as are expressly granted, or are necessary to the exercise of those which are so granted. (Bosworth, J.)

Hence, in the appropriation of public funds or property their powers are limited, and when they attempt to make such an appropriation, for purposes not authorized by their charter or by positive law, their act, whether clothed with the form of legislation or not, is without authority and void. (Bosworth, J.)

When a discretion is confided to persons appointed by law or to a municipal corporation, a court of justice will not attempt to control its exercise. (Bosworth, J.)

But if those in whom discretionary powers are vested, threaten and are about to commit a gross abuse of power to the injury and in fraud of the rights of individuals and of the public, there is no principle or decision that precludes the interference of a court to prevent the threatened injury. (Bosworth, J.)

When a judge who grants an injunction decides erroneously upon the facts alleged in the complaint, his error has no bearing upon the question of his jurisdiction. (Bosworth, J.)

The proper course, in such a case, of a defendant upon whom the injunction has

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been served, is to move for its dissolution, but so long as it exists he is bound to obey it. (Bosworth, J.)

As a corporation acts only through its officers and agents, it is only by them that an injunction directed to the corporation can be violated. (Bosworth, J.) Hence, every such officer or agent is bound by the injunction, and when he performs knowingly the act which is prohibited, is chargeable with all the consequences of wilful disobedience. (Bosworth, J.)

Unless the officers who thus violate the injunction can be punished, there can be no penalty whatever, and every injunction directed to a municipal corporation may be violated with impunity. (Bosworth, J.)

It would be absurd to sequester the property of the corporation, since this would be to inflict an injury upon the citizens whose rights are violated or endangered, and would, in effect, be punishing the aggrieved and not the guilty party. (Bosworth, J.)

Motions for attachments against those members of the common council, who voted in favor of a grant which the corporation was enjoined from making, granted.

(Special term, before Duer, J., assisted and advised by Campbell, Bosworth, and Emmet, J.J.)

Jan. 15, 22, and 29; Feb. 5, 1853.

(Affirmed at general term by Duer, Bosworth, and Emmet, J.J. March 12, 1853.)*

This was a motion for an attachment against Oscar W. Sturtevant, one of the aldermen of the city, for an alleged contempt of the court, by his voluntary breach of an injunction directed to the defendants.

There were similar motions against other members of the Common Council, noticed for the same day, but that against Alderman Sturtevant was first and separately heard.

The motion was founded on the complaint, injunction, and affidavits, and was resisted upon affidavits, on the part of the Common Council and its members who joined in the acts alleged to be a breach of the injunction.

As the arguments of counsel, and in a measure the opinions of the judges, turned upon the allegations in the complaint, it is deemed necessary to set it forth *in extenso*.

The plaintiffs, Thomas E. Davis and Courtlandt Palmer, in

* As the decisions of the judge at special term, in this and the next case, were affirmed, without further argument, at general term, they have all the authority of general term cases, and it is therefore deemed proper to report them as such. Connected as the cases are, the propriety of publishing them in immediate succession seems also apparent.

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this suit, complain to this court, as well on their own behalf, as on behalf of all other corporators and tax payers of the city of New York, who may be affected by the several matters herein complained of, against the Mayor, Aldermen, and Commonalty of the city of New York.

The plaintiffs, for a cause of complaint, respectfully show to the court:

That they are citizens of the state of New York, and residents and inhabitants of the city of New York, and have been such residents and inhabitants for several years last past, and are two of the corporators of said city.

That they are severally owners of very considerable real estate situated on the street known in said city as Broadway, and elsewhere in said city; and are also severally owners of considerable personal estate in said city, subject and liable to taxation; and have been such owners of real estate for many years past, and have been severally annually taxed and assessed upon the same, and have severally paid such taxes and assessments annually, to an amount exceeding two hundred and fifty dollars, levied towards and for the public expense of governing the said city and the inhabitants thereof.

The plaintiffs show, upon information and belief, that the taxes levied and assessed by the defendants upon the real and personal property of the citizens and tax payers of said city for several years past, are as follows:

For the year 1846,	.	.	.	.	\$1,654,323 00
For the year 1847,	.	.	.	.	\$1,824,211 00
For the year 1848,	.	.	.	.	\$1,992,150 00
For the year 1849,	.	.	.	.	\$2,302,564 00
For the year 1850,	.	.	.	.	\$2,578,969 00
For the year 1851,	.	.	.	.	\$2,258,150 00
For the year 1852,	.	.	.	.	\$2,561,650 00

And the amount estimated as required for the coming year, amounts to the enormous sum of \$3,972,195 00.

That by reason of the corrupt and illegal acts of said defendants, in squandering the public moneys, in farming out and disposing of, in almost every imaginable way, the public pro-

perty, contracts, rights, privileges, and franchises, in the manner hereinafter stated, and in various other ways, the taxes of said city are annually increasing to an alarming degree. The effect has already been to induce large numbers of persons, doing and transacting business in said city, to remove out of the limits thereof, to avoid the onerous and increasing taxes annually imposed upon the property owners of said city.

That the said city of New York is an ancient and chartered city, and the citizens and inhabitants thereof are a body politic and corporate, under the name of The Mayor, Aldermen, and Commonalty of the city of New York. .

That all the lands, tenements, hereditaments, jurisdictions, liberties, immunities, franchises, rights, and privileges, held, exercised, and enjoyed by the said Corporation of the said city, were given, granted, and acquired by them under the said name of The Mayor, Aldermen, and Commonalty of the city of New York.

That the said body politic and corporate, has perpetual succession, and is able in law to sue and be sued, implead and be impleaded, answer and be answered unto, defend and be defended, in all or any of the courts of this state, having jurisdiction over corporations, in all and all manner of actions, suits, complaints, pleas, causes and matters, and demands whatsoever, of what kind or nature soever, in as full and ample manner and form as other people of this state.

That all the powers of the said Corporation are held by them, upon the trust that they shall be used and exercised for the benefit of the citizens and inhabitants of said city, without any fraud, corruption, evil practice, or deceit.

That in and by the ninth section of an act of the Legislature of this state, entitled "An Act to amend the Charter of the city of New York," passed April 2d, 1849, it is declared, that the executive power of the Corporation shall be vested in the Mayor, the heads of departments, and such other executive officers as shall be created from time to time by law; and neither the Common Council, nor any committee or member thereof, shall perform any executive business whatsoever, except such as is or shall be specifically imposed on them by the laws of this state, and except that the Board of Aldermen may

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approve or reject the nominations made to them as thereafter provided.

That in and by section 12 of said act, it is further enacted: That there shall be an executive department in said corporation, under the denomination of the "Street Department," which shall have cognisance of opening, regulating, and paving streets, building and repairing wharves, &c.

That by section 19 of said act, it is, among other things, enacted: That no member of the Common Council, Head of Department, Chief of Bureau, or Deputy thereof, shall be directly or indirectly interested in any contract, work or business, or the sale of any article, the expense, price, or consideration of which is paid from the city treasury, or by any assessment levied by any act or ordinance of the Common Council.

That in and by the eleventh section of an act of the Legislature, entitled "An Act to amend the Charter of the City of New York," passed April 7th, 1830, it is further enacted: That no member of either board of the Common Council shall, during the period for which he is elected, be directly or indirectly interested in any contract, the expenses or consideration whereof are to be paid under any ordinance of the Common Council, except emoluments or fees which he is entitled to by virtue of his office.

And the plaintiffs further show, that, under the laws of this state, the said corporation are commissioners of highways, and as such, have the power of making repairs upon said streets, and to make them useful and convenient for all the inhabitants of said city, and travellers and sojourners therein.

That said corporation have not, either in or by their charter, or by the laws of this state, or otherwise, any power whatsoever to give or grant to any person or persons whomsoever, any particular or exclusive privilege to use any street or streets, or any part of any street or streets in said city; or to erect or put up any building, work, or structure, or any obstruction whatsoever in the said streets, or any of them, or to do any other act which might, in any manner, interfere with the free and common use thereof by any of the inhabitants of, or travellers in said city, or which might become a nuisance.

The plaintiffs further show, that, on the 16th day of July,

1852, a petition, of which a copy is annexed thereto, marked A, and forming part of this complaint, was presented to said Common Council, through their said board of aldermen, for an ordinance authorizing the petitioners who signed the same, to establish and construct a railroad in said Broadway.

That, afterwards, numerous remonstrances were presented to said board of aldermen, by the principal owners of property on Broadway, against such project.

The plaintiffs further show, that said Broadway is the principal street or thoroughfare in said city. That the greater part of that portion of said street which lies between the Battery at the south, and Union Place at the north, a distance of about three miles, is now devoted to trading and commercial purposes; and a large portion of the trading and commercial business of the said city, greater than that of any other street, is now transacted in said street, and the small portion of the street which is yet used for dwellings, is rapidly changing its character, and stores, shops, and other buildings for trading and commercial purposes, are rapidly taking the place of dwelling houses.

The plaintiffs further say, on information and belief, that said street is now constantly thronged with all kinds and descriptions of vehicles and passengers. That the portion of said street located below Canal street, a distance of about a mile and a half from said Battery, is more thronged and crowded than any other part of said street or said city. That the average width of the carriage-way in said Broadway does not exceed forty feet; that at Maiden Lane, it does not exceed thirty-nine feet, and from thence it gradually narrows to thirty-seven feet at Wall street; from thence to about forty feet below Rector street, it narrows to thirty-four feet; from thence to about two hundred and fifty feet below Rector street it gradually widens to not over thirty-seven feet; at one hundred feet farther down, it is thirty-eight feet two inches, and thus gradually widens to not exceeding forty feet two inches in front of No. 42 Broadway; and at no point between the Park and Union Place, does said carriage-way exceed forty-two feet in width.

The plaintiffs further show, that for the purpose of putting the said carriage-way in the most perfect order and condition,

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and to facilitate the great and increasing travel thereon, which is at this time far beyond that of any other street in said city, the said corporation have very recently caused about two miles and a half thereof, extending (with the exception of a few blocks) from the Battery to Eighth street, to be paved with a very durable and expensive pavement, known as the Russ pavement, consisting of square blocks of granite, carefully laid upon a concrete bed of hydraulic cement, mixed with gravel and sharp stones.

That said corporation have, as the plaintiffs are informed and believe, expended upon said pavement, and paid, or are bound to pay therefor, out of the city treasury, upwards of \$500,000. By means whereof, a great burden has been brought upon the tax payers of said city, including the plaintiffs.

The plaintiffs further show, that before any final action was had upon said petition, and while the same was before the Common Council for consideration, various other petitions and propositions were presented to them by men of wealth, character, and standing, residents of said city, fully and abundantly able to fulfil and perform their engagements and promises, asking for the privilege and authority to construct and establish such a railroad in said Broadway, and run cars and carry passengers, upon the following terms:

1. One of said propositions was, to give for such authority and privilege, \$1,000,000, payable in ten annual instalments, and agreeing to charge each passenger only three cents fare.

2. Another of the said propositions was, to give for such authority and privilege, the sum of \$1,666 66 for each car run thereon, and agreeing to charge each passenger only five cents fare.

3. Another of the said propositions was, to give for such authority and privilege, as a license fee for each car, any sum imposed, not exceeding \$1,000 per annum, and agreeing to charge each passenger only three cents fare.

4. Another of the said propositions was, to give the corporation, for such authority and privilege, in lieu of license fees, one cent for each passenger thereon, and agreeing to charge each passenger only five cents fare.

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5. Another of the said propositions was, for such authority and privilege, to charge each passenger only five cents fare; and also pay into the city treasury, for the benefit of said city, a bonus of \$100,000 per annum.

6. Another of the said propositions was, for such authority and privilege, to conform and comply in all respects with the covenants and conditions set forth in a resolution of which a copy is hereunto annexed, marked B, and further agreeing therefor, to reduce the rate of fare, mentioned in the 12th subdivision of said resolution, from five cents to three cents for each passenger.

The plaintiffs further state, upon information and belief, that the offer contained in said proposition, numbered 2, would, if accepted, produce a sum exceeding \$250,000 per annum, for the benefit of said corporation, and the relief of the tax-paying citizens, while each passenger would be charged but five cents fare.

That the offer contained in said proposition, numbered 4, would, if accepted, produce a sum exceeding \$300,000 per annum for the benefit of said corporation, and the relief of the tax-paying citizens, while each passenger would be charged but five cents fare.

That the offer contained in said proposition, numbered 5, would, if accepted, produce the sum of \$100,000 per annum, for the benefit of said corporation, and the relief of the tax-paying citizens, while each passenger would be charged but five cents fare.

That the offer contained in said proposition, numbered 1, would, if accepted, produce the sum of \$1,000,000 for the benefit of said corporation, and the relief of the tax-paying citizens, while these plaintiffs, and other persons riding in said cars, would be charged but three cents fare, and be thereby materially benefited.

That the offer contained in said proposition, numbered 3, would, if accepted, produce the sum of \$150,000 per annum, for the benefit of said corporation, and the relief of the tax-paying citizens, while these plaintiffs, and other persons riding in said cars, would be charged but three cents fare, and would be thereby materially benefited.

That the offer contained in said proposition, numbered 6, would, if accepted, materially benefit these plaintiffs, and other persons riding in said cars, by establishing the rate of fare at three cents, while the corporation and said tax-payers and citizens would derive all benefit which can or may be derived from the covenants and conditions mentioned and set forth in said resolution annexed, marked B.

And the plaintiffs further show, that in and by the charter of said corporation and the laws of this State, the legislative powers of said defendants are vested in the boards of aldermen and assistant aldermen thereof, and monthly sessions of said boards are authorized to be held, commencing on the first Monday of each month, and to continue for such period as in their opinion the public business may require. But neither board is authorized to adjourn for a longer period than three days, except by a resolution to be concurred in by the other body.

The plaintiffs further show, that the last November session of said boards commenced on the first day of said month; on which day said board of aldermen met, and adjourned to the 4th then instant. On said 4th day of November, said board of aldermen again met, and adjourned to the 8th then instant, without the concurrence of said board of assistant aldermen by resolution or otherwise; whereby and by means whereof, as the plaintiffs claim and insist, the session of said board of aldermen, and their powers as a legislative body, and part of said Common Council, for and during said month of November, ceased and determined on said 4th day of November, 1852.

Notwithstanding which, said board of aldermen afterwards, and on the 19th day of November, 1852, met, and under the color of being assembled as a board of aldermen and co-ordinate branch of said corporation, adopted a resolution, of which a copy is hereunto annexed, marked B, and which forms a part of this complaint.

That afterwards said resolution was transmitted to said board of assistant aldermen, for their concurrence. That on the 6th day of December, 1852 (being the first day of the session for that month), the said board of assistant aldermen did, notwithstanding the remonstrances and petitions aforesaid, adopt said

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resolution, and order the same to be transmitted to the mayor of said city, for his approval.

That subsequently, and on December 18th, 1852, said mayor returned said resolution to said board of aldermen, without his approval, and accompanied by his objections thereto. A copy of such objections is hereunto annexed, marked C, and forms a part of this complaint.

The plaintiffs further show, upon information and belief, that the several and respective members of the said boards who voted in favor of said resolution and grant, being a majority of the members elected to each of said boards, have given out, threatened, and declared, that they intend to adopt and pass said resolution, notwithstanding the objections of said mayor, and that they intend to keep said boards in session during the month of December for that purpose; and to that end have met and adjourned (frequently for want of a quorum for the transaction of business), from time to time, in anticipation of the coming in of said mayor's objections, and with the intent of protracting their session, for the purpose of passing and adopting said resolution, notwithstanding their compensation for service in their respective boards terminated after the first eight days of their session—and which have long since expired; and these plaintiffs are apprehensive that said resolution will be passed as aforesaid, as soon as the said boards can by law act on the same.

The plaintiffs further show, on information and belief, that the grantees or persons named in said resolution have given out and alleged, that upon said resolution being adopted by said boards, they intend forthwith to accept the same in writing, as therein provided, and will thereupon proceed to break up the pavement, lay down the said railway, and establish said railroad in said Broadway.

The plaintiffs further show, that the laying down of such a railway, and the establishment of a railroad in such a thronged thoroughfare as Broadway, is as yet an untried experiment; and the same cannot, as the plaintiffs are informed and believe, be laid in said street without disturbing and thereby destroying said Russ pavement so recently laid therein, at such a vast expense to the tax payers of said city.

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The plaintiffs further show, upon information and belief, that the laying of such railway would require at least four months, if prosecuted with diligence; during all which period, said street would be rendered almost wholly impassable, to the great injury and detriment of these plaintiffs, and other persons having occasion to use and travel in said street.

The plaintiffs further say, that they, and all other citizens and travellers, now have a right to the free and common use of the whole of the carriage-way of said street, with their carts, carriages, and other vehicles; and that establishing a railroad in said street will be appropriating the street to a new and unauthorized use, and one which is exclusive in its nature, to the great injury and damage of those who now have a free and common right therein as aforesaid.

The plaintiffs further show, that said street is too narrow to admit the establishing of such railway, consistent with the rights, privileges, and interests of the citizens and tax payers of said city, and other travellers in said street. And, further, the plaintiffs are advised and believe, and therefore charge, that such railway, if constructed, will be a public nuisance in said street.

And the plaintiffs further aver, on information and belief, that said corporation has no right, power, or authority, under any law of this state, or otherwise, to establish or construct such a railroad in said street, nor can they grant the right or privilege to construct and establish such a railroad therein to any person or persons.

The plaintiffs also aver, claim, and insist, that if said corporation have the right to grant the use of said street to private individuals for such a purpose as laying and establishing a railroad therein, then, and in such case, it certainly is the duty of said corporation, and they have the right to impose any proper terms and conditions upon which such grant shall be made, and should consult the true interests of said city by accepting those voluntary offers and terms made by responsible individuals, which, while they insured equal accommodation to said citizens, tax payers, travellers, and the public generally, would secure the highest compensation, and produce the greatest revenue to said city.

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The plaintiffs also aver, claim, and insist, that a grant to the individuals named in said resolution upon the terms, stipulations, and conditions named therein, will be, if unrestrained, a fraud upon the travelling public and said citizens, because it permits the parties named therein to charge five cents fare for each passenger; whereas unexceptionable and worthy citizens of abundant means and ability, have offered, and are willing to accept said grant upon the same terms, stipulations, and agreements, with a permission to charge only three cents passenger fare.

And further, that a grant to the individuals named in said resolution, upon the terms, conditions, and stipulations named therein, will be, if unrestrained, a fraud upon the tax payers of said city, including the plaintiffs, because many other unexceptionable and worthy citizens of said city, of abundant means and ability, have offered, and are willing to accept said privilege of constructing and establishing such railway, and pay therefor into the city treasury annually, many hundred thousands of dollars, and which would materially diminish the annual taxes levied and imposed in said city—said resolution only permitting the imposition of the nominal sum of \$20 per car, by way of license fee; whereas \$1000 and upwards, by way of license fee on each car, has been voluntarily offered as aforesaid, for such permission, grant, and privilege.

The plaintiffs further claim and insist, that the adoption of said resolution should be restrained, because it attempts to bind the said corporation for ever; and thus limit and control the legislative power of said Common Council.

And also, because it attempts to create an odious and unjust monopoly, not within the legislative powers of said corporation or Common Council.

The plaintiffs are also advised and believe, and therefore charge and insist, that if the said corporation are authorized to construct, or allow of the construction of such railroad, in the manner provided by said resolution, such authority, and all contracts, stipulations, and agreements in relation thereto, are within the province of, and are to be exercised by one of the executive departments of said corporation, known as the "Street Department."

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The plaintiffs further, upon information and belief, aver that all the said acts and doings of said Common Council, in relation, or tending to the establishment of such railroad, are in bad faith, and in direct opposition to the interests of said corporation, and of the citizens, tax payers, and other inhabitants of said city, and of travellers therein.

The plaintiffs therefore, on their own behalf, and on behalf of all other tax-paying citizens and inhabitants of said city, demand that an injunction order may be issued by this court, directed to the said defendants, the mayor, aldermen, and commonalty of the city of New York, their counsellors, attorneys, solicitors, and agents, restraining and enjoining them, and each and every of them, from granting, or, in any way or manner, authorizing Jacob Sharp and others, the persons named in said resolution, or their associates, or any other person or persons whomsoever, the right, liberty, or privilege of laying a double or any track for a railway in said Broadway, from the South Ferry to 57th street, or any railway whatsoever in said Broadway, or of breaking or removing the payment, or in any other manner, to obstruct the said street, preparatory to, or for the purpose of laying or establishing any railway therein, until the further order of this court in the premises.

And the plaintiffs further demand, that this court will make such injunction order perpetual against the said defendants, or afford the plaintiffs, for themselves, and others, on whose behalf this suit is brought, such other or further proper, appropriate, and adequate remedy and relief, as the case herein presented entitles them.

The following is the resolution pending in the Common Council to which the complaint refers :

Resolved,—That Jacob Sharp, Freeman Campbell, William B. Reynolds, James Gaunt, I. Newton Squire, Wm. A. Mead, David Woods, John L. O'Sullivan, Wm. M. Pullis, Jonathan Roe, John W. Hawkes, James W. Faulkner, Henry Dubois, John J. Hollister, Preston Sheldon, John Anderson, John R. Flanagan, Sargent V. Bagley, Peter B. Sweeney, Charles B. White, James W. Foshay, Robert E. Ring, Thomas Ladd, Conklin Sharp, Samuel L. Titus, Alfred Martin, D. R. Martin,

William Menzies, Charles H. Glover, Gershon Cohen, and those who may for the time being be associated with them, all of whom are herein designated as associates of the Broadway railway, have the authority and consent of the Common Council to lay a double track for a railway in Broadway and Whitehall or State street, from the South Ferry to Fifty-ninth street; and also, hereafter, to continue the same, from time to time, along the Bloomingdale road to Manhattanville, which continuation they shall be required, from time to time, to make, whenever directed by the Common Council, the said grant of permission and authority being upon and with the following conditions and stipulations, to wit,

First.—Such tracks shall be laid under the direction of the street commissioner, in or near the middle of the street, the outer rails not exceeding twelve feet six inches apart, and the rails being laid flush and even with the pavement, the inner portion of the rail being of equal height with the outer, with grooves not exceeding one inch in width, or such other rails as shall be approved by the street commissioner or the Common Council, on such grades as are now established, or may hereafter be established, by the Common Council; and the said associates shall keep in good repair the space between the said rails, and one foot on each side; and no motive power, excepting horses, shall be used below Fifty-ninth street.

Second.—The said associates shall place new cars on said railroad, with all the modern improvements, for the convenience and comfort of passengers. And they shall run cars thereon, every day, both ways, as often as the public convenience may require, under such directions as the Common Council may, from time to time, prescribe. Said cars, with horses attached, not to exceed forty-five feet in length.

Third.—The said associates shall, in all respects, comply with the directions of the Common Council in the building of such railway, and in the running of the cars thereon.

Fourth.—At the Bowling Green, the said associates may divide the two tracks aforesaid, running one of them down Whitehall street, and the other down State street, should they deem such division necessary; and also, whenever in the course of their route the said road shall pass a public square, it may

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be carried with a single track, round both sides of said square, instead of only one, for the better accommodation of the public on both sides thereof.

Fifth.—The said associates shall be required to procure a depot, at some place near or at the lower part of said route, for the purpose of keeping withdrawn from Broadway such proportion of the cars coming down in the morning as shall not be required for the accommodation of the return travel until the afternoon; and also, they shall be required to stop a portion of the cars at the Park, and to send down below that point no greater proportion of the whole number employed, than shall be found by experience to be requisite for the accommodation of the travel below that point, subject to regulation by the Common Council.

Sixth.—The cars shall be so constructed as not to make provision intended for standing passengers to crowd upon the seated passengers; and also, when all the seats are full, the cars shall not be stopped to take in more passengers to be crowded into the said seats; a flag being displayed in front of the car to give notice that all the seats are full.

Seventh.—The said cars shall not be allowed to stop, so as to obstruct a crossing, nor to stop more frequently in a block (unless the same be of extraordinary length) than just beyond its first crossing, except in rainy weather.

Eighth.—The said associates shall keep an attendant, distinguishable by some conspicuous mark or badge, at every such appointed stopping place, in all parts of the street usually much crowded with vehicles, whose duty it shall be, with attention and respect, to help in and out of the cars all passengers who may desire such assistance, and in general to watch over the safety of passengers from all dangers of passing vehicles.

Ninth.—The said associates shall be required to keep, or cause to be kept in readiness, a number of sleighs adequate to the public accommodation, when the travel of the cars may be obstructed by snow.

Tenth.—The said associates shall cause the said street to be well swept and cleaned every morning, and the sweepings carried away, before eight o'clock in summer, and nine o'clock in winter, except Sundays; this provision applying to the whole

of the street south of Fourteenth street, above which point the same shall be done as often as twice a week when the weather will permit.

Eleventh.—No higher rate of fare shall be charged for the conveyance of passengers from any one point to any other point along said route, and such combined system of routes as may hereafter be adopted by means of cars and transverse omnibuses, than five cents for each passenger.

Twelfth.—In consideration of the good and faithful performance of all these conditions, stipulations, and requirements, and of such other requirements as may hereafter be made by the Common Council, for the regulation of the said railway, as aforesaid, the said associates shall pay, for ten years from the date of opening the said railway, the annual license fee for each car, now allowed by law, and shall have a license accordingly; and after that period, shall pay such amount of license fee, for further licenses, as the Corporation, with permission of the Legislature, shall then prescribe; or, in default of consenting thereto, shall surrender the road, with all the equipments and appurtenances thereto belonging, to the said Corporation, at a fair and just valuation of the same.

Thirteenth.—Within a reasonable time after the passing of this resolution, the said associates, or a majority in interest thereof, shall form themselves into a joint stock association, which association shall be vested with all the rights and privileges hereby granted, and shall have power, by the votes of at least a majority in interest of the associates, to frame and establish articles of association and by-laws, providing for the construction, operation, and management of the said railway, the mode of admitting new associates, and of transferring the shares or interests of any of the associates to new associates or assigns, the number, duties, mode of appointment, tenure, and compensation of officers, the manner of making contracts, amending the by-laws, and calling in assessments from the associates, and generally the means and mode of establishing the railway and carrying it on, and of controlling and managing the property and affairs of the said association.

Fourteenth.—The association shall not be deemed dissolved by the death or act of any associate, but his successor in inte-

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rest shall stand in his place; and the right of each associate shall depend on his own fulfilment of the conditions imposed on him by these restrictions, or the articles of association and by-laws of the association; and in case of his failure to fulfil the same, after twenty days' notice in writing to him so to do, his rights shall be forfeited to and devolve upon the remaining associates. And said associates may, at any time, incorporate themselves under the general Railroad Act, whenever two thirds in interest of the associates shall require it.

Fifteenth.—The associates, whose names are set forth in this resolution, shall by writing, filed with the clerk of the Common Council, signify their acceptance thereof, and agree to conform thereto; and all new associates or assigns, duly admitted according to the provisions of the articles of association, and by-laws, shall be deemed parties to such agreement.

Copies of the petition of Jacob Sharp and others, and of the objections of the mayor to the passage of the above resolution, although annexed to and forming a part of the complaint, are omitted as immaterial.

Upon the complaint, Mr. Justice Campbell, on the 29th of December, 1852, granted the following order of injunction:

“It appearing from the complaint in this action, duly verified, that the plaintiffs are entitled to the relief demanded in the said complaint, and that such relief consists in restraining the defendants, as hereinafter provided:

“Now, therefore, in consideration of the premises, and of the particular matters in said complaint set forth, I do hereby command and strictly enjoin the said defendants, the Mayor, Aldermen, and Commonalty of the city of New York, their counsellors, attorneys, solicitors, and agents, and all others acting in aid or assistance of them, and each and every of them, that they and each of them do absolutely desist and refrain from granting to, or in any manner authorizing Jacob Sharp and others (the persons named in the resolution of which a copy is annexed to said complaint, and marked B.) or their associates, or any other person or persons whomsoever, the right, liberty, or privilege of laying a double, or any tract for a railway in the street known as Broadway, in said city of New York, from the South Ferry to Fifty-seventh street, or any railway whatsoever in said Broadway;

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and from breaking or removing the pavement in said street, or in any other manner obstructing said street preparatory to, or for the purpose of laying or establishing any railway therein, until the further order of this court in the premises.

“WM. W. CAMPBELL.”

It appeared from the affidavits on the part of the plaintiff, that a copy of the injunction had been duly served on each member of the Common Council, and a similar copy, together with a copy of the summons and complaint, duly served on the Mayor. That, after the service of the injunction, the board of aldermen met on the evening of the 29th December, and by the votes of a majority of its members, passed and adopted the resolution and grant referred to in the complaint and in the injunction. That Alderman Sturtevant was one of this majority, and that upon his motion, the board, upon the same evening, passed the following preamble and resolutions :

Whereas, the Hon. William W. Campbell, one of the judges of the Superior Court, has, without color of law or justification, assumed the prerogative of directing and controlling the municipal legislation of this city, by issuing an injunction prohibiting the Mayor, Aldermen, and Commonalty of the city of New York, from performing a legislative act, supposed by him to be probably about to be performed, and summoning the said Mayor, Aldermen, and Commonalty to appear before him, and show cause why the said injunction should not be perpetual. And whereas, the said injunction issued at the close of a session, and throwing forward the period of such showing of cause beyond the expiration of the session, in regard to a measure which has been pending for months, bears on its face a character of indirection not less unjustifiable and not less unworthy of the judiciary than the usurpation of authority and jurisdiction which is contained in such an attempted injunction itself. And whereas, if the legislative act in question should prove, on judicial investigation, to be open to any objection or illegality or unconstitutionality, there would always exist ample opportunity for restraining its execution by injunction upon the first proceedings of the parties authorized to carry the same into effect. And whereas, if such a precedent of unwarranted and

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unwarrantable interference with the rightful functions, powers, and duties of a legislative body, attempted by a judge, be submitted to, or tolerated without just rebuke, not only will the whole municipal legislation of this city, with its half million of inhabitants, be subjected to the caprice or interested views of any judge who might be found willing to come forward with attempted vetoes in the form of injunctions, but the next natural step of judicial usurpation will be to arrest and veto in similar manner, the legislation of the state, or that of Congress, on any judge's opinion of constitutionality, expediency, or motive, at the close of a session, when all business of importance is usually completed. And whereas, the reasons alleged therefor are equally untenable in law and unfounded in fact—

Resolved, That as this Common Council will not encroach on the lawful jurisdiction and powers of any other public authority or body, so also will it never allow any other to interfere unlawfully with its own, which it holds from the people, and which it is bound to exercise, according to its own judgment, and on its own responsibilities, and not according to the views and directions of any judge or other individual citizen; and that it is the duty of the Common Council on this unprecedented occasion, to protect its own dignity and the rights of the people of the city of New York, its constituency, by utterly disregarding the said injunction upon its legislative action, and declaring its sense upon the same.

Resolved, That the Common Council have an equal authority and right to suspect and impute improper motives to any intended judicial decision of any judge, and consequently to attempt to arrest his action on the bench, as such judge has in regard to the legislative action of the Common Council.

Resolved, That in reference to the measure against which the injunction in question is directed, it was adopted by the Common Council on grounds of public expediency, justice, and right, for the best good of the city, both in regard to the accommodation and service of the public, and in regard to the interests of the city treasury, and also on petitions from more than thirty thousand citizens, and that nothing has yet appeared which shakes the ground on which it was so adopted, and that we

shrink from no discussion or investigation, judicial or otherwise, into the foundations of these grounds, and the reasons of our action, collectively or individually. Which was adopted by the following vote, viz.:

Affirmative—Aldermen Moore, Haley, Sturtevant, Oakley, Barr, Tweed, the President, Aldermen Brisley, Smith, Bard, Denman, Cornell, Peck—13.

Negative—Aldermen Boyce, Francis, Ward, Doherty—4.

A number of affidavits were read on the part of the defendant, Sturtevant, but as their contents were deemed irrelevant by the court, as denying only some of the allegations in the complaint, and not the facts relied on as proving the contempt, they are omitted.

J. Van Buren and *G. C. Bronson*, with whom were *G. Wood*, *J. W. Gerard*, and *J. R. Whiting*, argued in support of the motion for an attachment, and insisted upon the following points and authorities:—

I. The court had jurisdiction over the parties, and over the subject matter of the complaint, and having jurisdiction, the question whether the order for an injunction was made upon proper and sufficient grounds, does not arise upon this motion. 1. The court has jurisdiction over corporations as well as over natural persons. 2. The plaintiffs complained that an injury was about to be done to their legal rights by a wrongful act of defendants, and prayed that the defendants might be restrained from doing the act. Nothing further was necessary to give jurisdiction, and it was then for the court to judge and decide, whether a proper case was made for granting the relief which the plaintiffs asked. And when a court has jurisdiction, its judgment or order is never void, however erroneous it may be. 3. The resolution which the Common Council was about to pass, was, in no proper sense of the term, an act of legislation. It was not a law, but a contract. It was what the Common Council itself called a grant. But if it was material to consider whether it was a law or grant, that was a question upon which the court was to judge; and if it erred in judgment, still its order was valid until it should be reversed or vacated. 4. If the resolution which the Common Council

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was about to pass, may properly be regarded as an act of legislation, it was still a question for the court to decide whether relief might not be granted against an injury attempted to be done in that form: and whether the judgment was right or wrong, it was not void. 5. We shall contend, at the proper time, that there is no color for the pretence set up by the Common Council that the power to make by-laws and ordinances for the government of the Corporation and inhabitants of the city, stands on the same footing as "the legislation of the state, or that of Congress;" and that in such matters they are above and beyond the reach of the judiciary. We shall maintain that the Common Council may be controlled when it is about to do an injury to third persons, although the wrongful act may take the form of a by-law or ordinance. And clearly this is so when the thing which the Common Council proposes to do, though in the form of a law, is in truth a grant of the property or privileges of the city. But it is enough for the present to say that whether it was proper to enjoin the Corporation in this case was a question for the court to decide, and whether its judgment was right or wrong, it was valid, until reversed or annulled.

II. So long as an injunction remains in force, it must be obeyed, although it may have been erroneously, or even irregularly issued (2 Paige, 326, 329, *The People v. Spalding*; 3 Paige, 253, *Higbie v. Edgerton*; 4 Paige, 444, *Sullivan v. Judah*; 4 Paige, 163, *Hawley v. Bennett*; 4 Paige, 450, *Rogers v. Patterson*; 7 Paige, 364, *Lansing v. Easton*; 3 Sandf. S. C., 162, *Capet v. Parker*; 1 Barb. Ch. Pr., 634, 635, 636; 4 Howard's P. R., 225, *Krom v. Hogan*; 6 Howard's P. R., 124, *Smith v. Reno*; 6 Ves., 109, *Marquis of Downshire v. Lady Sandis*; Eden. Injunc., 102; 2 Cases in Chancery, 204, *Woodward v. King*).

III. The injunction to restrain the making of the grant was properly addressed to the Corporation; and when served, the order was operative upon every branch and official member of the corporate body (1 Ld. Ray. 559, 560, *The King v. The Mayor of Abingdon*; 2 Salk. 669, S. C.; Comb. 213, *Harcourt v. Fox*; 2 Kyd on Corp., 347, 349; 8 Mod. 111, *The King v. The Mayor and Burgesses of Tregony*).

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IV. There was a breach of the injunction by every member of the Corporation who, after the service of the order, voted to make the grant. Every such member acted in direct contempt of the authority of the court, and the commandment of the law (Comb. 326, 327, *Smith v. Butler*; Cooper Ch. Cas. 77, *Agar v. Regent's Canal Company*; 1 H. Black. 207, *The Mayor, &c. of London v. The Mayor, &c. of Lyme Regis*; 1 Barb. Ch. Pr. 636, *Bank Commissioners v. City Bank of Buffalo*; 5 T. R. 607, 622, *The King v. Holland*; 8 Wend. 203, 209, *Kane v. The People*; 2 Kyd on Corp., 350; Angel & Ames on Corp., 681; Code, § 218; 2 R. S., 534, § 1. sub. 3, 8; § 20, 21, 22, 25, 26; 7 Hill 302. *Spalding v. The People*).

V. When any one acts in an official character in disregarding an injunction, or order of the court, it is not the officer, but the individual, who is punished for the contempt.

VI. This is the most aggravated case of contemning the court and its process that has happened in modern times; and if it is not followed by an exemplary punishment, it will be impossible to maintain the administration of justice in future.

D. D. Field and *C. O'Connor*, with whom were *E. Sandford*, *F. B. Cutting*, and *R. I. Dillon*, resisted the motion on the following grounds:

First.—The injunction was not intended to restrain, does not by its terms apply to, and does not purport to restrain the Common Council from re-considering the resolution in question, and agreeing to pass or to reject the same.

I. It rejects by implication the proposal of the complaint that such a restraint shall be imposed. This, it is presumed, was because the grounds on which the plaintiffs sought to impose it were frivolous. All acts of this nature are revocable at the pleasure of the council. (*Britton v. Corp. of N. Y.*, Oct. term, 1844; *Brick Church v. Mayor &c.* 5 Cow. 542; S. P. 7 Cow. 604.

II. Neither the charter nor any known practice of the courts has ever subjected to preliminary judicial restraint the mere

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legislative action of the Common Council. Consequently, it could not be supposed that the court intended to exercise such a power, unless express words to that effect were found in the injunction, or such construction of its terms was unavoidable.

1. Where a legislative act is within the power and discretion of a municipal council, it is against all precedent for the courts to interfere. English chancery disclaimed jurisdiction in such cases. (*Frewin v. Lewis*, 4 Myl. and Cr. 249; S. C. 9 Simons, 66.) 2. Where such act is not within the legislative power, it is void on its face; and no injunction against passing it could ever be necessary. (*Wiggin v. New York*, 9 Paige, 23; *Mayor v. Meserole*, 26 Wend. 132; 3 Comst. 430.) 3. The mere laws or ordinances of a municipal body can never be grievances in themselves, especially if revocable at pleasure. It is only the execution of them that can prejudice. (*Pettigrew & Sherman v. Corpr. of N. Y.*, Superior Court.) 4. In some respects, such jurisdiction would be impracticable. For instance, the Mayor could give his approval by simple inaction; and surely preliminary injunction or mandamus could not be allowed commanding him to disapprove a measure. (Act of 1830, p. 127, § 14.) 5. It is by imperative terms made the absolute duty of the council, on the return of an act with the Mayor's objections, to record the objections, publish them, and re-consider the act. (Act of 1830, p. 127, §§ 12 and 13.) 6. There is no precedent of an injunction to restrain a municipal corporation from adopting a resolution, or to restrain a party from steps merely initiatory, which in themselves vest no right.

Secondly.—The utmost object and intent imputable to the injunction was to restrain the consummation of a right or title in the intended grantees or licensees. It may have pointed to, and intended to restrain the act which was to vest in them an authority or license. The determination or resolution of the council had no such effect. In order to vest any power or authority under the resolution, it was necessary that the licensees should tender, and that the clerk, as an executive officer of the Corporation, should file an agreement in writing, to accept the conditions. How far an injunction aiming at this result could be made effectual without including Sharp and

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his associates as parties, and restraining them, it is unnecessary to inquire. (*Tradesmen's Bank v. Merrit*, 1 Paige, 302; *Johnson v. Harris*, 7 Vesey, 257; 4 Johns. Ch. R. 25.)

I. Assent on the part of the grantee is indispensable to every grant and appointment. (4 Wheaton, 225; 2 Sand. Ch. R. 244; *Angel & Ames on Corp.* 71; Willcock, 30, S. 25; 4 Paige, 44; 6 Vesey, 109.)

II. On the construction of this injunction claimed by the plaintiffs, an individual restrained from making a grant, and requiring to absent himself on business, could not sign, seal, and acknowledge a deed, and leave it with his attorney, to be delivered immediately upon the expected dissolution of the injunction. 1. The injunction does not in this case, as is sometimes done, restrain attempts to do the act, or things leading to it. It is merely the final act itself which is forbidden, *i. e.* the consummated grant of authority.

Thirdly.—The court had no jurisdiction, on the prayer of these plaintiffs, to restrain any action of the Corporation.

I. Owing to the inconvenience which would result from an interference of the judiciary with the action of the government, courts of common law and courts of equity invariably abstain from the exercise of any discretionary jurisdiction over acts of government—local or general. (*People v. Supervisors of Alleghany*, 15 Wend. 211; 13 Wend. 671; 20 Pick. 79; *Weaver v. Desendorf*, 3 Denio, 119.)

II. Suits of this description lie only to protect some individual right or interest of the plaintiff. A mere tax-payer in a municipal corporation has no interest which will entitle him to sustain a suit against the corporation for mismanagement or misgovernment of the corporate property, or abuse or excess of corporate power. The judicial remedies in such case, are—1. *Quo warranto* by the state for misuser of franchises. 2. Equitable action by the state, to prevent breaches of trust, or other misconduct, requiring some specific equitable remedy.

Fourthly.—This court should not assume jurisdiction to restrain the passage of the resolution in question, on the ground that the Corporation, in adopting the same, exceeded its authority.

I. Such power, when exercised over subordinate bodies, has

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never been directed to restrain the making of ordinances, by-laws, or resolutions, but only to restrain the performance of acts, in execution of them.

II. The objection, that the ordinance in question is an executive act, as presented on this motion by the plaintiffs, is suicidal. The injunction only prohibits the Corporation from doing any act, which, if done, would be an operative grant. If the resolution was not a grant, it was not within the prohibition.

III. The resolution in question was within the legislative power, and its adoption did not involve the performance of any executive act. The legislative is the principal or chief authority in a government; the other departments are but the mere ministers of its will. The judiciary reads and expounds its will; the executive carries that will into execution. It follows, as a consequence, that the grant of legislative power is far more comprehensive than a grant of executive, or even of judicial power. It is the general receptacle of governmental authority. (Federalist, art. 48, p. 280; Notes on Virginia, p. 195.) 1. The judiciary disclaims the power of making or creating law. It merely expounds, for purposes of practical application, the written statutes of the Legislature, and those "statutes worn out by time or accident," which are called the customary or "common law" of a state. (2 Wilson, 348.) 2. The judiciary deliberate, it is true, but not in the sense in which the Legislature deliberates. It is the deliberation of research. It seeks not to establish a rule of future action, but only to find what is the law. When that is ascertained, its duty is simple and direct. It has no discretionary authority or moral right to do otherwise than simply to declare the rule it has ascertained. 3. The executive power is organized merely to perform the acts which the Legislature has determined upon as wise and expedient. Nothing like deliberation or discretion properly belongs to the executive power, as a simple abstract idea. 4. The legislative power is the will of the state; the judicial is its memory; the executive is its hand. The first creates the rule of action; the second is the living record of its existence; the last carries it into execution.

IV. Whenever any matter requiring the exercise of choice, selection, discretion, is submitted to an executive officer, it is so

far, in principle, a delegation of legislative power. 1. Even where separate departments are created by a fundamental law, this delegation must be allowed, because of the necessity of the case, and the actual impossibility of reducing to an arbitrary classification, the extensive and infinitely diversified circle of human concerns. Some discretion must necessarily be allowed to the lowest executive officers. More is necessarily allowed to those of higher grade, from the magnitude and importance of the subjects and interests on which they act. But all of them, in exercising such discretion, employ to that extent the legislative power. (*Sproule v. Samuel*, 4 Scammons, 134; *Wilkinson v. Leland*, 2 Peters, 659, 660; *Federalist*, p. 273.) 2. It follows that, so far as in the nature of things it is practically possible, it is legally or constitutionally within the competency of the legislative power to restrain these encroachments upon, or usurpations of, its proper functions, by giving, in its laws for the government of the executive, an exact and definite rule of conduct, leaving no room for any other than mechanical action. 3. The same is abstractly true of the judicial power. Were it practically possible for the Legislature to form a code containing, in express terms, admitting of no mistake or misconstruction, a rule of conduct for every case that could arise, the judges would become mere clerks, to frame the appropriate writs of execution by which to put the executive power in motion.

V. The direction of all details touching the intended railroad, as the selection of site, form, speed of cars, managers or licensees, was an act within the competency of the legislative power.

Fifthly.—The members of the Common Council are not parties to the action, or officers of this court; and, therefore, they are not amenable to attachment on the relation of the plaintiffs, as for a contempt, not criminal, but merely tending to “defeat, impair, impede, or prejudice the rights or remedies” of the party in the cause. (2 R. S. 534, § 1.)

I. The court may, *ex-officio*, or on the relation of any person, attach and punish, as a criminal contempt, certain acts of misbehavior tending to obstruct its proceedings. (2 R. S. 278, § 10, subd. 1 to 6.)

II. But the so-called contempt, which is not otherwise detri-

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mental to the course of justice, except in so far as it "defeats, impairs, or prejudices" the mere private rights or remedies of the party, cannot be committed, except by a party to the suit. (2 R. S. 534, § 1.) 1. No instance has been produced, and it is confidently believed none can be found, in which such a jurisdiction was exercised. On such a question, "the silence of Westminster Hall" is conclusive. 2. The cases arising under the law of mandamus, &c., against corporations, are not in point; the writ usually goes to the particular officer or officers, commanding him or them to do the particular acts, &c.

Sixthly.—The plaintiffs not having served the affidavit on which the injunction was obtained, as imperatively required by the code, section 220, cannot charge the parties with a mere civil contempt, for failing to yield obedience to their process.

I. Under the old practice, a party could not involve his adversary in the pains and penalties of a contempt without strict service,—an actual exhibition of the order duly authenticated was necessary. A mere office copy would not suffice for this purpose. (Graham's Practice, 712; *Howland v. Ralph*, 3 Johns. 19, and cases there cited.)

II. Under the same practice, it was required that orders temporarily staying proceedings, until motion, &c., should be accompanied by notice of motion. An omission to conform to this rule rendered the stay nugatory. (Graham's Practice, 680; 5 Cow. 438; 1 Caines, 505.)

III. In the present case, the complaint was "the affidavit" under the rule in question. Its service was specially called for, since it is incorporated with, and made part of the injunction by the express words of that process. 1. No judge has power to make an injunction, except on affidavit. (Code, § 220.) 2. If there was no affidavit, the injunction was without authority, and void. None being served, the party might well assume that none existed.

BY THE COURT. DUER, J.—A motion has been made in this case for an attachment against Oscar W. Sturtevant, one of the aldermen of this city, for an alleged contempt of the authority of this court, by an act of positive disobedience to its lawful process.

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The material facts that have given rise to the motion, and upon which its determination, in a measure, rests, I shall endeavor to state in few words.

On the 27th of December last, the plaintiffs, in their own right, and on behalf of all others, the tax-paying inhabitants of this city, exhibited their complaint, duly verified, to our associate, Mr. Justice Campbell, who, on the same day, in conformity to the prayer of the complaint, and holding that the matters set forth therein entitled the plaintiffs to the relief demanded, granted an order of injunction, commanding and enjoining (*inter alia*) that the defendants, the mayor, aldermen, and commonalty of the city, and each of them, should absolutely desist and refrain from granting to, or in any manner authorizing Jacob Sharp and others (the persons named in a resolution of which a copy was annexed to the complaint), or any other person or persons, the right, liberty, or privilege of laying a double or any track for a railway in the street known as Broadway, in this city, from the South Ferry to Fifty-ninth street, or any railway whatever.

The resolution of the Common Council, to which the complaint and injunction refer, is upon its face, not only by its manifest intent, but by its express words, a grant of permission or authority, upon certain conditions and stipulations, to Jacob Sharp, and other persons named as his associates, to lay a double track for a railway in Broadway and Whitehall or State street from the South Ferry to Fifty-ninth street; and to render the resolution, when finally adopted, effectual as a grant, nothing more was required than that the persons named as associates should, by a writing to be filed with the clerk of the Common Council, signify their acceptance. The complaint alleged that the resolution had, before that time, been adopted by each board of the Common Council, and had been returned by the mayor, with his objections, to the Board of Aldermen in which it originated, and averred that those members of each board (constituting in each a majority of those elected), by whose votes the resolution had originally passed, had given out and declared that they intended again to pass the same, notwithstanding the objections of the mayor, and that the grantees named in the resolution had also made known

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their intention to file their written acceptance immediately upon its adoption.

The actual conduct of the parties corresponded with these anticipations.

On the 28th of December, the order of injunction, together with a copy of the summons and complaint, was duly served upon the mayor, and upon the same or the following day, the injunction, with a copy of the summons, was served upon each member of the Board of Aldermen.

On the evening of the 29th of December the Board of Aldermen met, and the resolution making the grant to Sharp and his associates being brought forward for reconsideration, it was again passed—the alderman now before us and twelve of his associates voting for its adoption. And, in order, it would seem, that no doubt might remain as to the nature and motives of their action, the majority of the board, upon the same evening, and upon the motion of Alderman Sturtevant, adopted certain resolutions, which are set forth at large in the papers before us, but which we deem it unnecessary now to recite.

It is sufficient to say, that one of these resolutions declared, that it was the duty of the Common Council to protect its own dignity and the rights of its constituents, the people of the city, “by utterly disregarding the injunction upon its legislative action, and declaring their sense of the same;” and that a preamble to the resolution, which was adopted with them, declared their sense of the injunction by denouncing it, in no measured terms, as an attempt, without color of law or justification, to direct and control the municipal legislation of the city; as bearing upon its face a character of indirection, not less unjustifiable and not less unworthy the judiciary, than its usurpation of authority and jurisdiction, and as a precedent of an unwarranted and unwarrantable interference with the rightful functions, powers, and duties, of a legislative body.

The original resolution or grant, and the additional resolutions vindicating the rights and dignity of the Common Council, were transmitted to the Board of Assistant Aldermen, and, on the evening of the 30th of December, the original resolution was adopted by that body; but whether any action was then, or has since been, taken on the additional resolutions, does not

appear. On the same evening the associates named in the original resolution, by a writing signed by them all, and filed with the clerk of the Common Council, signified their acceptance of the resolution, and their agreement to conform thereto; and thus, if these proceedings were valid, the grant, which the order of injunction prohibited the defendants from making, became absolute, and the grantees acquired the very right, liberty, and privilege of laying a track for a railway in Broadway, which the injunction, by express words, had strictly commanded should not be given.

It follows from the statement that has now been made, that a majority of the members of the present Board of Aldermen have deliberately chosen to place themselves towards this court and its proceedings (for the act of the judge, who issued the injunction, is that of the court—Code, § 218) in a relation of direct and open hostility. Admitting their own knowledge of the order of injunction, and of the reasons upon which it was founded—reasons which they have declared to be untenable in law and unfounded in fact—construing the order as commanding them to desist and refrain from the performance of the act which they were determined to perform, and have performed—they have chosen to treat it as an illegal assumption of authority, an exercise of power without right, which their duty to themselves and to their constituents required them to disregard and resist. Relying on their own knowledge and convictions, not only of their own duties and powers, but of the duties and powers of the judiciary of the State, they have publicly raised an issue which this court is compelled to meet and bound to determine. That issue is, whether this court, by an unprecedented stretch of judicial authority, has invaded the province, and violated the rights, of the Common Council as a legislative body, or those members of that body, who have openly denied and boldly disregarded the authority of this court, are guilty of the criminal disobedience with which they are charged, and we are now called upon to punish.

The questions, therefore, which this motion involves, possess no ordinary interest. It is felt by all, that they are, in no ordinary degree, grave and delicate. With a just sense of their importance, they have been elaborately argued by the counsel

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of the parties, and have been carefully and anxiously considered by ourselves. For obvious reasons, it would be desirable, were it possible, that these questions should be determined by another tribunal; but, as no such transfer can be made of our jurisdiction, we must not and will not shrink from the responsibility which the law imposes.

If the injunction that has been issued was indeed an unjustifiable excess of jurisdiction—an unprecedented act of judicial power—it will be our duty to confess, and, with all possible expedition, correct the error; but if the lawful mandate of this court, issued in the exercise of its known jurisdiction, has been publicly denounced and wholly disregarded by those to whom it was directed, and who were, from their official position, under a peculiar obligation to respect and obey it, we should indeed be unworthy of our station, could we hesitate to maintain firmly the rights of the judiciary, and vindicate effectually the insulted, but, we trust, still paramount authority of the law.

We proceed to the immediate consideration of the questions that have been discussed.

It has been contended that Alderman Sturtevant is not liable to an attachment for the contempt with which he is charged, for the following reasons:

First, Because he is not a party to the suit, and the law is settled that it is only a party against whom relief is sought and may be given, who is bound by an injunction.

Second, Because the service of the injunction upon him was irregular and void, not being accompanied by the service of a copy of the affidavit, the verified complaint, upon which it was founded.

Third, Because the only breach of the injunction with which he is charged, consists in the act of voting for the resolution to which it refers; an act to which the terms of the injunction do not apply, and which they were not intended to restrain.

And lastly, Because if the injunction must be construed as intended to restrain the reconsideration and adoption by the Common Council of the resolution in question, the prohibition, as illegal and void, was properly disregarded; no court of law or equity having any jurisdiction to control, in any case, or for

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any reasons, the legislative action of a corporate, and more especially, of a municipal body.

These objections will be considered in the order in which they have been stated.

The first, that Mr. Sturtevant is not a party to the suit, and, therefore, was not bound to obey the injunction, we are all of opinion cannot be sustained.

It is unnecessary now to determine the question whether, under the provisions of the Code (section 219), a person to whom an injunction is directed is wholly excused from obedience unless he is a party to the suit, and one of those against whom relief is demanded. It will be time enough to consider and decide this question (which is, perhaps, more doubtful than it seems to have been regarded), when it shall properly arise in a case before us. It does not arise in the case now before us, for the plain reason, that Mr. Sturtevant is, in judgment of law, a party to the suit. He is not indeed a party in his proper name, or as a mere individual, but he is so, in his official character, and it is his personal action in that character that the injunction, not only by its legal construction, but by its express words, seeks to restrain. It is not addressed to the Mayor, Aldermen, and Commonalty of the city as an abstract metaphysical being, but it is addressed to each individual member of the whole corporate body, and it controls the personal action of every one of them whose consent or co-operation might be necessary to the completion of the corporate act, which it strictly prohibits. It imposes a command and duty upon every one of them to refrain absolutely from performing or concurring in the performance of the prohibited act, for the very purpose, and as the necessary means, of preventing it from becoming an act of the Corporation. It is not true, as the objection we are considering plainly assumes, that when a judicial command in relation to a corporate act, a mandamus, or injunction, is directed to a corporation solely by its corporate name, the members and officers through whom alone the Corporation can act, may disregard it with entire impunity, and by their disobedience render the process of the court wholly ineffectual. The law, we apprehend, is otherwise settled. That the mandate of the court in these cases may with entire propriety be directed exclusively

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to the corporate body, by its corporate name, has not been denied, and there are numerous decisions that show, that when such is the form of the order or writ, it is operative and binding, not only upon the corporation itself, but upon every person whose personal action, as a member or officer of the corporate body, it seeks to restrain or control. Every such person is as fully bound to personal obedience, as if personally named in the process, and consequently is just as liable for his disobedience. (*Rex vs. Mayor of Abingdon*, 1 Lord Raymond, 560; *Rex vs. Mayor of Shelford*, 2 Cases in Chan. 171-2, Lord Raymond, 848; *Rex vs. Mayor of Tregony*, 8 Mod. 111; *Bank Commissioner vs. City Bank of Rochester*, 1 Barb. Ch. R. ps. 636.) We understood the learned counsel for the defendants to admit that in the case of a mandamus, the law is such as we have stated; and we are clear in the opinion, that in respect to the persons upon whom it operates, there can be no distinction between a mandamus and an injunction. Indeed, all the decisions rest upon the same principle, a principle which Lord Kenyon, in the case of *Rex v. Holland*, has briefly and forcibly stated. (5 Term. R. 622.) It is, that where "a duty is thrown upon a body consisting of several persons, each is individually responsible for its performance, and individually liable for its breach;" and in the application of this principle, it is plainly immaterial, whether the duty result from an act of the Legislature, or the mandate of a court of justice.

We remark, in conclusion, that upon any other construction than that which we adopt, an injunction addressed exclusively to a corporation must be, in all cases, a nugatory and senseless proceeding. A corporation cannot be attached, nor have we been able to discover that there are any means by which, when such is the form of the injunction, its obedience, as a corporation, may be compelled, or its disobedience punished. And that there are none, Lord Loughborough, in the case of the *Mayor of London v. the Mayor of Lynn*, seems distinctly to admit. (1 H. Black. 209.) Unless the injunction, therefore, in such cases, operates upon those members and officers of the Corporation by whom its corporate will is manifested, and corporate acts performed, and unless it creates a duty for which they, as parties to the suit, are personally responsible, it

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is emphatically *brutum fulmen*—the words may be those of command or menace, but they are addressed to no one, and signify nothing.

The next objection, that the omission to serve upon the aldermen, with the injunction, a copy of the complaint, rendered the service of the injunction itself, as to them, inoperative and void, like the preceding, we are satisfied, must be overruled. It furnishes, in this case, no reason for not proceeding to an attachment.*

Notwithstanding the positive terms of the Code (sec. 220), we doubt exceedingly whether, when the injunction itself is duly served, the omission to serve a copy of the affidavit upon which it was founded, may, in all cases, be alleged as a valid excuse for disobedience. When the order of injunction cannot properly be understood, nor, consequently, be obeyed, without a knowledge of the contents of the affidavit, the service of a copy must doubtless be made. But when the injunction is plain and explicit, and leaves no doubt as to the act which the party upon whom it is served is required to perform, or desist from performing, it may well be doubted, whether the irregular omission of the affidavit should be held to release him from the duty of obedience. In such cases, a knowledge of the contents of the affidavit would neither instruct him as to his duty, nor avail to discharge him from its performance, since whatever may be the facts stated in the affidavit, the injunction, when emanating from a competent authority, until dissolved, must be obeyed. (*Krom v. Hogan*, 4 Howard, P. R. 225; *Woodward v. King*, 2 Ch. Ca. 203; *Sullivan v. Judah*, 4 Paige, 446.)

The purpose for which the Code very properly requires that a copy of the affidavits shall in all cases be served, is, not that the party upon whom it is served may determine, whether he will or will not obey the injunction, but merely to enable him, without delay, if so advised, to move for its dissolution.

It is not, however, upon the ground that in this case the alleged irregularity in the service of the injunction was not such as to excuse the disobedience that followed, that we overrule the objection. The papers show that there was, in truth, no irregularity that the defendant, Sturtevant, can be

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permitted to allege. A copy of the complaint, together with the injunction, was duly served upon the mayor, on the 28th of December, the day before the meeting of the board of aldermen. The service was properly made upon him as the chief officer (2 R. S. p. 458, section 5), and for that purpose the representative of the whole Corporation, and we are clearly of opinion that this service was sufficient and effectual, as to every member of the corporate body whose personal conduct, as such, the injunction was designed to control; and to whom the actual knowledge of its contents may justly be imputed. That the defendant, Sturtevant, and the aldermen who acted with him, possessed this knowledge is not denied, and it even seems that they well knew what were the allegations in the complaint itself. They have resolved that the reasons alleged for the injunction "were untenable in law and unfounded in fact." It is only in the complaint, however, that these reasons are alleged, and it is therefore from the complaint that their knowledge of them must have been derived. Under these circumstances, it would indeed be a mockery of justice to permit the alleged irregularity, in the service of the injunction, to excuse its deliberate and confessed violation—confessed, we mean, in the resolutions of the aldermen, although not in the arguments of their counsel.

Passing, then, from objections merely preliminary and formal, we proceed to an inquiry which touches, in a measure, the merits of this motion, namely—whether the defendant, Sturtevant, has, in fact, been guilty of the contempt with which he is charged; and this he certainly has not, unless he has committed some act from which the injunction, by its terms or its necessary construction, commanded him to desist and refrain. It is true that Mr. Sturtevant, and those who acted with him, have publicly declared that they understood the injunction in the very sense for which the counsel for the plaintiff contend, as the only sense of which its terms are susceptible. And it is also true, that thus understanding the injunction, they not only disregarded, but proceeded, so far as depended on their own action, to rescind and nullify it; but we shall not hold that they are concluded by their mistake, if a mistake they have committed. Their error does not work an estoppel, for, unless they have violated the injunction in its true legal construction, there

has been, no breach for which they are liable to be punished as a contempt, whatever may be thought of their intentions and their language.

What, then, is the command of the injunction? What the corporate act which its terms prohibit?

If we read the complaint, it is manifest, that the sole object of its prayer, which the injunction exactly followed, was to prevent the adoption of the resolution in relation to a railroad in Broadway, which it alleged that the Common Council meant to reconsider, and had determined to pass; but we have some doubts, whether the allegations in the complaint can with propriety be invoked to govern the construction of the injunction, and it is therefore to the terms of the injunction that, in considering the question we have proposed, we mean to confine ourselves. The language of the injunction is clear and unambiguous. The corporate act which it prohibits is that of granting to Jacob Sharp and his associates, or to any other person, the authority and privilege of laying down a double or any other track for a railway in Broadway, between certain limits; and if no such grant, as a corporate act, has been made, the injunction has not been violated. The fact, however, that such a grant has been made is undeniable: it is not only confessed by all, but avowed and gloried in by those who made it and by those who have obtained it. The resolution making the grant has been reconsidered and adopted, and, in the very mode which it prescribes, has been accepted by the grantees; and Jacob Sharp and his associates now claim to possess, by a valid title, the very right, liberty, and privilege which the injunction, speaking the voice and carrying with it the authority of this court, has said they should not be permitted to acquire. The corporate act that the injunction prohibits has been performed, and it therefore seems an affront to common sense to say that the injunction has not been violated. It has been violated just as certainly as if, by express words, it had forbidden the passage of the resolution it was designed to prevent. We repeat, the injunction has been violated; and the only inquiry that remains is—By whom has it been violated, and who, assuming it to have been rightfully issued, are amenable to this court for their contempt of its authority?

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It is idle to speak of its violation as merely a corporate act, for which no member or officer of the Corporation is or can be liable. We have already shown that an injunction may be properly directed to a corporation solely by its corporate name, and that, when so directed, it operates to restrain the personal action of every member of the corporate body by whose assent or co-operation the corporate act that is forbidden may be accomplished.

In the case before us, the injunction not only commanded the Board of Aldermen and the Board of Assistants not to make the grant to Jacob Sharp and his associates, which it describes, but it commanded each alderman and each assistant not to give his assent to any such grant, if proposed for his adoption,—not to give his assent to it, for the purpose, and with the intent, of rendering it operative and effectual as a corporate act. The resolution adopted by the Common Council is the very grant that the injunction describes, and to this grant every alderman who voted for the resolution, with the intent that it should take effect as a corporate act, has given his assent. Every one of them, therefore, who has thus assented, the conclusion is plain and irresistible, has done the very act that the order of the court commanded him not to do, and, by so doing, has violated its mandate and contemned its authority. And unless this be true it follows that when an injunction, directed to a body consisting of several persons, commands them not to perform a joint act, although all unite in performing the act, no one of them breaks the injunction—no one of them is liable to be punished.

Two partners intend, by their joint act, to make a fraudulent transfer of their whole partnership property; suspecting their design, their creditors file a complaint, and obtain and serve an injunction, by which the intended transfer, the meditated fraud, is strictly forbidden. The transfer is, however, made, the fraud accomplished, the authority of the court defied, and the guilty partners rejoice in their impunity. Neither of them, it seems, can be attached, for the valid reason, that the fraudulent transfer was the act of both, and, therefore, the act of neither.

Let it not be said that the supposed case is not analogous;

the analogy, in truth, is perfect, for it is not at all affected or impaired by the circumstance that the body to which, in the present case, the injunction was directed, was a corporation, not a partnership. The injunction in this case commanded the Common Council not to make a certain grant to certain persons. The Common Council has made the grant; yet we are told that the injunction has not been broken, or, if broken, has been broken by the Common Council alone, the two boards forming the body, and not at all by the individual members, by whose concurrent votes the grant, as a corporate act, was adopted and effected.

In conclusion, the whole argument, it is manifest, depends upon the truth of the proposition with which we started, namely, that an injunction directed to a corporate body, is binding upon the individual conscience, and restrains the individual action, of each of its members. If this, as a proposition of law, is certainly true, and that it is so we cannot doubt, then the injunction, which, in this case, has plainly been violated by the Corporation, as a body, has just as plainly been violated by every member, who has given his individual assent to the corporate act, by which such violation was effected. That assent was given by the member now before us, Oscar W. Sturtevant. He has therefore, as an individual, violated the injunction, and having thus been guilty of the contempt with which he is charged, the attachment moved for must be issued against him, unless the order of this court, which he has disobeyed, was itself unlawful and void.

It is upon this ground alone that he has himself justified his disobedience, and it is upon this ground alone, that he can be exempted from its punishment.

Before we proceed, however, to the discussion of the question whether the order of this court, from its total want of jurisdiction, was illegal and void, there are some considerations hitherto unnoticed, to which it seems expedient to advert.

Hitherto we have passed over in silence an argument upon which the counsel for the defendants seemed to lay a peculiar stress—namely, that the injunction was not violated, at all, by the mere adoption of the resolution containing the grant to Jacob

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Sharp and his associates, and, consequently, not violated by those by whose votes the resolution was passed.

The adoption of the resolution, it was said, was not a grant. It was merely an inchoate and initiatory act, which, but for the subsequent acceptance of the grantees, might have remained, for ever, ineffectual. Until this acceptance was executed and filed, no grant was made, no authority, right, or privilege given, and, consequently, until then, neither in its terms, nor in its spirit, was the injunction violated. This acceptance, however, was the act of persons to whom the injunction did not extend, and for whose acts, neither the Corporation nor its members, can be made responsible.

Notwithstanding the apparent confidence with which this argument was urged, we find it difficult to believe that it was seriously meant to be pressed upon our adoption, since it could hardly have escaped the counsel that, with equal propriety and force, might the same argument be urged in every case in which a grant, transfer, or any disposition of property whatever, is forbidden to be made, either by a corporation, a partnership, or an individual. In no case, is a grant effectual by the mere will and act of the grantor. In every case, it depends for its ultimate validity upon the assent and acceptance of the grantee. Hence, if the argument is valid, it follows that an injunction, which is meant to restrain a fraudulent or illegal grant, addressed only to the grantor, may be disregarded, in all cases, with entire impunity. You cannot punish the grantor, a fraudulent trustee or debtor, because the grant, which he executed and delivered, might have been rejected by the grantee, and but for his acceptance would have been wholly ineffectual. You cannot punish the grantee, for he was not named in the injunction.

The reply to the argument in the cases supposed, is exactly that which must be given in the present. The fraudulent trustee or debtor is forbidden to make the grant, with the intent that it shall be effectual, and in a mode, by which it may be rendered so; and when it is proved that he has done all that he could do to render the grant operative and valid, he is certainly and justly punished.

So in the present case, the Common Council, and a majority of its members, have done all they could do to render the grant, they were forbidden to make, operative and effectual. They passed the resolution with the intent that it should operate as a grant, and in the confident expectation that, by its acceptance, it would become such. If they meant otherwise, they either should not have adopted the resolution at all, or, when they had passed it, should, as they might have done, have forbidden its acceptance. As the case stands, they have made the grant which they were commanded absolutely to desist and refrain from making; and this grant, as they intended, by their permission and with their consent, has become absolute. Hence, if words have a meaning or the law an intention, they have violated the injunction both in its letter and in its spirit, and, I am constrained to add, they meant to violate it, and knew that they had done so.

We are told, however, that the members of the Common Council could not have acted otherwise than they did. Their charter bound them, it is said, to reconsider the resolution, and when reconsidered, it was not merely their right, but their duty, to vote upon it, according to the dictates of their own conscience, and to punish them for the exercise of this right would be injustice and tyranny. The answer is brief and conclusive. The charter imposed upon them no such absolute duty as is asserted. When an ordinance or by-law is returned to the Common Council, we apprehend that its reconsideration depends, in all cases, upon the will of the majority; and assuredly, in the present case, they were not bound to reconsider the resolution, at the time, and in the manner, they did. I add, that even upon a supposition that they were bound, by the provisions of their charter, to reconsider the resolution, they were equally bound, by the mandate of this court, to rescind and reject it, when reconsidered, if the order of the court was, in truth, issued, in the exercise of its proper jurisdiction.

I pass, therefore, to the last and most important objection that has been urged as conclusive against the present motion—the alleged want of jurisdiction in this or any court, to restrain the action of the Common Council upon the subject before them, as was attempted by the injunction which they choose

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to disregard. It was upon this allegation that the defence of the Common Council was mainly rested in the argument before us, and it is, exclusively, upon its truth that its members, in the first instance, elected to place their own justification of their conduct. The question which it involves has been perplexed by much extraneous reasoning and learning, and complicated with many considerations that do not at all belong to it; yet, if I mistake not, it is simple in its own nature, and, by no means, difficult of solution.

The true and only question is, whether from the total want of jurisdiction in this court over the subject matter to which the order of injunction related, the order was void, upon its face; for it is this defect of jurisdiction, and this alone, that has been or can be pretended to exist, and when it exists, it must, in all cases, be thus apparent. The injunction commanded the Corporation and its members to desist absolutely from the performance of certain specified acts, and, if this command could, under no circumstances, be rightfully addressed by a court of equity to a municipal corporation, the Common Council and its members, in the just maintenance of their own rights, were bound to disregard it: but if it was a command that, under any circumstances, upon any grounds, and for any reason whatever, this court might impose upon the Common Council and its members, it was at their own peril that they refused to obey it. They had no right to regulate their conduct by their own opinion, or the opinion of their counsel, as to the truth or sufficiency of the allegations in the complaint, upon which the order addressed to them was founded. For the purpose of determining whether they would obey or disregard the injunction, they had no right to look into the complaint at all, and this, for the plain reason, that the jurisdiction of the court may be certain and undoubted, and yet the facts and allegations set forth in the complaint be wholly insufficient to warrant its exercise. When this insufficiency exists, there is a want of equity in the complaint, for which the injunction will be dissolved; but this want of equity is no evidence of a want of jurisdiction, that, rendering the process void, justifies disobedience. A party upon whom an injunction is served (they are the words of Chancellor Walworth

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that I quote) is not permitted to speculate upon the future decision of the court as to the equity of the bill, and disobey the injunction, upon the ground that, upon the merits, it ought not to have issued. (*People v. Spalding*, 2 Paige, 329; *Sullivan v. Judah*, 4 Paige, 446.) I add, that if there are any valid grounds in law, upon which the injunction, in a particular case, might have issued, although not one of the grounds may be stated in the complaint, the court has jurisdiction, and its order must be obeyed. It is erroneous, but certainly not void; and it is only a certain, a manifest invalidity, that can excuse and protect disobedience.

Although the want of equity and the want of jurisdiction (as was justly observed by the experienced and learned counsel who last addressed us) are frequently confounded, not only by text-writers, but by judges, yet the distinction, which separates them, is very reasonable and intelligible, as well as certain and established. This distinction, however, I cannot but think was, to a considerable extent, lost sight of in the arguments that were addressed to us on the part of the defendants, and it is this circumstance that rendered a large portion of the observations that were made, and authorities cited, wholly inapplicable to the true and only question now before us. It is, however, that question alone, as I shall again state it, that I mean to consider and discuss.

Was the order of this court, which, as an illegal exercise of power, was disregarded by the Common Council, void upon its face?

The order commanded the Common Council not to grant to Jacob Sharp and others, or to any other person, the right, liberty, and privilege of laying down a double, or any other track, for a railway in Broadway.

At the time this injunction was obtained, a resolution, making such a grant to Jacob Sharp and others, was about to be reconsidered by the Common Council, and, as the terms of the injunction embrace this resolution, and were, undoubtedly, meant to restrain its adoption, it is reasonable to construe the order exactly as it would be necessary to construe it, had it referred to and recited the resolution, and, by express words, had forbidden the Common Council to reconsider and adopt it.

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It is this construction, therefore, that I adopt, and, for the purposes of this opinion, I shall treat the resolution as an ordinance or by-law, and its reconsideration and adoption as properly acts of legislation, in the fullest sense, in which the term, legislation, can be justly applied to the acts of a corporate body.

Making these concessions, the denial of the jurisdiction of this court amounts to this—that a court of equity, of general jurisdiction, has no power, in any case, or for any purpose, to restrain the legislative action of a municipal corporation, nor in any manner to interfere with or control its legislative discretion, no matter to what subject the action may be directed, nor how manifest and gross the violation of law, even of the provisions of its own charter, that it may involve, and no matter by what motives of fear, partiality, or corruption, its discretion may be governed, nor how extensive and irreparable the mischief that, in the particular case, may be certain to result to individuals or the public, from its threatened exercise.

If this be true as a proposition of law, then the injunction order of this court, from the want of jurisdiction manifest on its face, was wholly void. If the proposition be not true, the order was valid, and should have been obeyed.

In justice to the counsel for the defendants, it must be admitted that they shrank not from maintaining the truth of the proposition in all its extent, well perceiving that the necessity of their argument admitted no alternative, since to admit a single exception, was to admit the jurisdiction which they denied.

In reply to a question put by the court, it was expressly affirmed by one of the counsel that, should the Common Council attempt, by an ordinance, and from motives manifestly corrupt, to convey, for a grossly inadequate or merely nominal consideration, all the corporate property of the city, neither this, nor any other court, would have power to suppress, by an injunction, the meditated fraud, or when consummated, to rescind the grant, or punish its authors, or divest them of its fruits. There could be no remedy, we were told, but from the force of public opinion and the action of the people at an ensuing election, and all this, upon the ground, that neither the pro-

priety, nor the honesty, of the proceedings of a legislative body, nor, while they are pending, even their legality, can ever be made a subject of judicial inquiry.

This, it must be confessed, is a startling doctrine. We all felt it to be so when announced, and I rejoice that we are now able to say, with an entire conviction, that, applied to a municipal corporation, it is just as groundless in law, as it seems to us, it is wrong in its principle, and certainly would be pernicious in its effects.

The doctrine, exactly as stated, may be true when applied to the legislature of the state, which, as a co-ordinate branch of the government, representing and exercising, in its sphere, the sovereignty of the people, is, for political reasons, of manifest force, wholly exempt in all its proceedings from any legal process or judicial control; but the doctrine is not, nor is any portion of it true, when applied to a subordinate municipal body, which, although clothed to some extent with legislative, and even political, powers, is yet, in the exercise of all its powers, just as subject to the authority and control of courts of justice, to legal process, legal restraint, and legal correction, as any other body or person, natural or artificial.

The supposition that there exists an important distinction, or any distinction whatever, between a municipal corporation and any other corporation aggregate, in respect to the powers of courts of justice over its proceedings, is entirely gratuitous, and as it seems to me, is as destitute of reason, as it certainly is, of authority. The counsel could refer us to no case, nor have we found any, in which the judgment of the court has proceeded upon such a distinction, nor, in our researches, which have not been limited, have we been able to discover that, by any judge or jurist, the existence of such a distinction, has ever been asserted or intimated. Were it otherwise—had such decisions been found in the English reports, or in those of our sister states—had it been proved that in England or in other states the supposed distinction is the established law, we should still be compelled to say that it is a law, which we must refuse to follow, for the plain reason, that it is directly inconsistent with the paramount authority of our own constitution. The constitution of the state declares that “all

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corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases, as natural persons." (Con. art. 8, sec. 3.) There is no exception here of municipal corporations, and an exception which the constitution has not made, we have neither the inclination, nor the power, to make ourselves.

A corporation subject to be sued, is necessarily subject to every process or order that, in the commencement, or in the progress, of the suit may be necessary to, or be connected with, the relief which is demanded. And the words "in the like cases," plainly mean, "for the like acts or omissions, and for the like reasons."

Rejecting, then, an imaginary distinction, the question as to the validity of the only defence which the members of the Common Council have set up in their own behalf, and on which their counsel have chiefly relied, their entire exemption from judicial control, in every proceeding, that they may choose to clothe with the forms of legislation, is seen to possess a far deeper and wider importance than could, at first, have been imagined. If the members of the Common Council are entitled to the immunity which they claim, exactly the same immunity, and exactly upon the same grounds, may be claimed, and justly claimed by all, who manage officially the concerns of any and every corporation in the city or state, the directors, managers, or trustees of every bank, insurance, or trust company, and even of every public library, or hospital, dispensary, or savings bank. They have all, legislative powers, in the same sense as the Common Council, powers not indeed as extensive in their operation, and not therefore as liable to be abused, nor as dangerous when abused, but just as legislative and discretionary in their nature. They all have the power of making by-laws for the regulation of their affairs and binding on their members, and they may all give the form of a by-law or resolution to any illegal or fraudulent proceeding into which they may be tempted or betrayed; and when, in compliance with the prayer of stockholders or creditors, or of any whose rights and interests they are about to sacrifice, a court of equity attempts, by an injunction, to restrain the proceeding, they may all, with the same propriety as the members of

the Common Council, defy the mandate, and denounce the attempt, as an unwarranted and unprecedented stretch of judicial power.

Notwithstanding these observations, the question still remains, has this court, or any court of equity, the power to interfere with the legislative discretion of the Common Council of this city, or of any other municipal corporation? And to this question I at once reply, certainly not, if the term discretion be properly limited and understood; and thus understood, I carry the proposition much further than the counsel who advanced it. This court has no right to interfere with and control the exercise, not merely of the legislative, but of any other discretionary power, that the law has vested in the Corporation of the city; and, hence, I deem it quite immaterial, whether the resolution in favor of Jacob Sharp and his associates be termed a by-law, a grant, or a contract, or whether the power exercised in passing it be termed legislative, judicial, or executive; for if the Corporation had the power of granting, at all, the extraordinary privileges which the resolution confers, the propriety of exercising the power, and, perhaps, even the form of its exercise, rested entirely in its discretion. Nor is this all. A court of equity has no right to interfere with and control, in any case, the exercise of a discretionary power, no matter in whom it may be vested—a corporate body or individuals, the aldermen of a city, the directors of a bank, a trustee, executor, or guardian; and I add, that the meaning and principle of the rule, and the limitations to which it is subject, are, in all the cases to which it applies, exactly the same. The meaning and principle of the rule are, that the court will not substitute its own judgment for that of the party in whom the discretion is vested, and thus assume to itself a power which the law had given to another; and the limitations to which it is subject, are, that the discretion must be exercised, within its proper limits, for the purposes for which it was given, and from the motives, by which alone those who gave the discretion, intended that its exercise should be governed. I select, for the purpose of illustration, a single case; The directors of a bank have a large discretion in making dividends, in appointing its officers, and

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in fixing the amount of their salaries; and in the exercise of this discretion, a court of equity, in the just application of the rule that has been stated, has certainly no right to control them. It has no right to say what dividends shall be made, what officers be appointed, or what salaries be allowed. But should the directors attempt to make a dividend of capital, instead of profits, or to raise the salaries to a sum so exorbitant as to equal or exceed the annual profits of the company; or in the case last supposed, by a secret compact, secure to themselves a large proportion of the aggregate sum allowed nominally as a compensation to others, it cannot for a moment be doubted, that a court of equity would be bound, upon the application of creditors or stockholders, to restrain or annul, according to the circumstances of the particular case, the illegal, unjust, or fraudulent act. The act, in the first case, would be an excess of power; in the second, an abuse of discretion, and from its manifest prejudice to the stockholders, a breach of trust; in the last, a scandalous fraud;—and, to the mind of an equity lawyer, it would be an absurd and monstrous supposition, that, in either of the cases, the directors, by giving to the proceeding the form of a resolution of the board, or by any other device, could evade the jurisdiction of the court, and enable themselves, with impunity, to set its mandates at defiance.

The conclusion from these remarks is, that a court of equity will not interfere to control the exercise of a discretionary power, when the discretion is legally and honestly exercised—and it has no reason to believe the fact is otherwise—but will interfere, whenever it has grounds for believing that its interference is necessary to prevent abuse, injustice, or oppression, the violation of a trust, or the consummation of a fraud. It will interfere—and it is bound to interfere—whenever it has reason to believe that those in whom the discretion is vested, are prepared illegally, wantonly, or corruptly, to trample upon rights, and sacrifice interests, which they are specially bound to watch over and protect.

Having stated these principles, the discussion may be regarded as closed, since the application of the principles to the case before us, is obvious and decisive. I shall therefore con-

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tent myself with referring to a few of the authorities by which they are sustained; and then proceed to apply them to the facts of the case.

The doctrine which, when stated in a condensed form, may be extracted from the decision of Lord Eldon in the leading case of *Agar v. The Regent's Canal Company* (Cooper's Eq. Cas. 77), is, that whenever a corporation is about to exceed its powers, and apply its funds or credit to some object beyond its authority, and whenever the purpose of the corporation, if carried out, would constitute a breach of trust, a court of equity cannot refuse to interfere and give relief by an injunction; and his lordship said that this was a most wholesome exercise of jurisdiction, since it would be most prejudicial to the interests of all with whose property the managers of a corporation might choose to interfere, if there were not a jurisdiction continually open and ready to exercise its power to keep them within their legitimate limits. In the case of the *River Dun Navigation Company v. North Midland Railway Company* (1 Railway Cases, 135), it was upon the same doctrine that Lord Cottenham—a judge scarcely inferior to Lord Eldon in judgment, learning, and research—placed the exercise of a jurisdiction, which he declared himself not at liberty to withhold. The case of *Frewin v. Lewis* (4 Mylne & Craig, 249) is one of those upon which the counsel for the defendants placed a strong reliance, for it was in this case that Lord Cottenham dissolved an injunction against the Poor Law Commissioners, upon the ground that its continuance would operate as an undue restraint upon the legal discretion of those important public functionaries; yet, in this very case, his lordship was careful to assert and maintain the rightful jurisdiction of his court, and said, “that when public functionaries are departing from the powers which the law has vested in them, and are assuming a power which does not belong to them, this court no longer considers them as acting under their commission, but treats them, whether a corporation or individuals, as persons dealing with property without legal rights;” and he added, “that when such persons infringe or violate the rights of others, they become, like all other individuals, amenable to the jurisdiction of this court by injunction.” The force and application of this language will be

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fully understood, when we remember that the powers of the Poor Law Commissioners are legislative, discretionary, and political, even in a more extensive sense than those of our own Corporation. I refer, lastly, to the three cases of the *Attorney General v. Aspinall* (2 M. & C. 613), *Same v. Corporation of York* (4 M. & C. 30), and the *Same v. Mayor of Dublin* (2 Bligh. N. R. 312), as proving that when property held by a municipal corporation is clothed with public duties, or the objects to which it must be appropriated or applied are defined by law, there arises a trust, the violation of which a court of equity has, not merely the power, but is bound, to prevent by an injunction.

The streets of this city, we are told, are the property of the Corporation, in which the fee is vested; but it is certain that this property is clothed with public duties, and that the objects to which alone it can be appropriated or applied, are strictly defined by law. Hence, according to the cases last cited, there is a trust in relation to the streets, the performance of which, a court of equity is competent to enforce by a decree, and, consequently, the violation of which, when threatened, it is bound to prevent by an injunction.

We are now in a condition to answer very decisively the question proposed—Was the injunction order directed to the Corporation void upon its face, from the total want of jurisdiction in the court by which it was issued? And the answer is that assuredly it was not, if there is any ground whatever upon which this court could lawfully restrain the Corporation from making the grant which the order described; and that there are many grounds upon which the restraint could be legally and justly imposed, we deem it no longer reasonable to doubt.

A few I shall now state:—

1. It may be that the Corporation has no power whatever either to establish itself, or to grant to others, the privilege of establishing a railway in any of the public streets in the city; and whether they have or not, is a question of law, which belongs not to the Corporation, but to courts of justice to decide; and until the decision, the exercise of the power may and ought to be restrained.

2. It may be that the establishment of a railway in Broadway would operate as an injurious monopoly, debarring the

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bulk of our citizens of the beneficial use and enjoyment of the street, and securing them almost exclusively to the grantees of the Corporation. The creation of such a monopoly would not only be an excess of authority, but a breach of trust, which may and ought to be prevented by an injunction.

3. It may be that the building of a railway in Broadway—from the inconvenience and discomforts it would create to citizens generally, and its special injury to the inhabitants—would be a public nuisance. To prevent the creation of a nuisance, no matter by whom created, is not only within the jurisdiction of the court, but, upon proper allegations in a complaint, its positive duty. The mode of relief is an injunction.

4. It may be that the Common Council intended, from motives of partiality or corruption, to make the grant to Jacob Sharp and his associates, upon terms far less beneficial than could certainly have been obtained from others, thus defrauding the treasury of the city, and imposing a heavy and unnecessary burden upon its tax-paying inhabitants. In such a case, to issue an injunction, forbidding the grant, is not to interfere with a legal discretion, but to prevent a flagrant breach of trust and the completion of an extensive fraud.

I have already said that, in considering the question before us it is quite immaterial whether all or any of these grounds of jurisdiction and relief are alleged in the complaint, since the omission would only prove a want of equity in the complaint, not, at all, of jurisdiction in the court; but it so happens that all of them are alleged in the complaint; and so distinctly and fully alleged, that the judge, who issued the order of injunction, would have failed in his duty had he refused to grant it. Upon such a complaint he had no liberty of refusal. It is possible, as the counsel for the defendants have insisted, that all the material allegations in the complaint are groundless or untenable, and that hereafter we may ourselves be satisfied that they are so, but I shall not now express or intimate any opinion upon questions, that can only be properly discussed and considered upon a motion to dissolve the injunction, or upon the final hearing.

The conclusion at which I have arrived, and which necessarily follows from the observations that I have made, is, that

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the order of injunction, which Alderman Sturtevant refused to obey, was a valid exercise of the established jurisdiction of this court, and, consequently, that no adequate cause has been shown why an attachment should not issue against him for the contempt, of which, from the papers before us, he appears to have been guilty. In this conclusion all the judges who assisted me—by each of whom, separately, all the questions in the case have been carefully examined—entirely concur.

The motion for an attachment is therefore granted.

BOSWORTH, J.—The plaintiffs move for an attachment against Oscar W. Sturtevant, one of the aldermen of the city, to arrest him for a contempt of court, in disobeying an injunction order made in this action by a judge of this court, on the 27th of December, 1852.

Having, with others of my brethren, at the request of the judge holding the special term at which the motion was made, heard the arguments of counsel for and against the motion, I shall, as briefly as practicable, state some of the views formed upon a consideration of the propositions argued and authorities cited.

To present these intelligibly, it is necessary to state some of the prominent facts of the case. (The learned judge here recapitulated the material facts as set forth and averred in the complaint, and then proceeded as follows:—)

The judge to whom application was made for the injunction order, granted it on a verified complaint stating these facts to be true. Whether true or false is a question which we are not called upon to determine on this proceeding. To determine whether he had any jurisdiction to make the order, the complaint alone can be looked at, and everything contained in it and stated to be true in fact, must be deemed to be true for all the purposes of the question before us. It was on the facts stated in the complaint, and those only, that the order was made. If the judge, on those facts, had jurisdiction to make the order, it was the duty of those to whom it was directed to obey it, until they had procured it to be vacated. If he had jurisdiction to make the order, it is incontestable that it was his duty to make it, if the facts stated in the complaint are true.

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According to the allegations in the complaint, the Common Council, against the objections of the mayor, were about to grant to Jacob Sharp and others, authority and power to construct and use a railway in Broadway, with liberty to charge each passenger five cents fare, on payment to the city of a license fee for each car run of only \$20 per annum, while others stood ready to take the grant, and construct such a railway, and run cars with equal accommodations, and charge only three cents fare, and pay a license fee of \$1,000 per annum.

As between two such propositions, there can be no pretence for saying that in the exercise of an honest discretion the former might be preferred to the latter. It is not a debatable question whether a license fee of \$1,000 per car per annum is more advantageous to the city than one of \$20, nor whether the interests of the community will be better subserved by each citizen being compelled to pay a fare of three cents, instead of five. Therefore, even if it can be successfully maintained, that the Common Council had the power to make the grant which the resolutions purport to make, it would be a gross abuse of power, and a flagrant violation of public duty, to make the grant as it was made, instead of making it to those who would pay, at the least, an additional million of dollars for it into the public treasury, and exact from the passengers only three cents fare, instead of five. Is it incontestable that such an abuse of power and violation of duty cannot be restrained by any court?

It must be conceded that this Corporation is liable to be sued, that the plaintiffs have capacity to sue, and that this court has power to make the order in question, if any court had power to make it, on the facts stated in this complaint. It is undeniable, that, if any jurisdiction can be exercised, the acts contemplated by the defendants are such as they may properly be restrained by injunction from doing.

If the facts stated in the complaint are true, the Common Council were intending, so far as they possessed power to accomplish the purpose, to grant to an association of individuals the right of appropriating to their exclusive use, to a certain extent, a portion of the centre of the main street of the city, and, to the same extent, to deprive all other inhabitants of the

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city of the right and privilege previously enjoyed by them of the free and common use of the whole of the carriage way of said street. They were about to make a grant authorizing the grantees to impose a charge or tax of five cents on every inhabitant who should ride in their cars, while others offered to construct a road in the same manner, and charge only three cents fare, and in addition to this pay into the treasury from \$100,000 to \$200,000 per annum, or \$1,000 per car.

The part of the charter or of any legislative act authorizing this to be done has not been pointed out. To make such a grant under such circumstances, even if the power exists to make any grant for the construction of a railway on the ground of its being "deemed good, useful, or necessary for the good rule and government of the body corporate," or with a view to public convenience, would be a clear abuse of power and violation of duty.

No one can pretend that it would promote public convenience, or tend to the good rule and government of the body politic, to compel every citizen to pay five cents fare, instead of three, or that the public treasury should be permitted to receive only \$20 instead of \$1,000 per annum for every car run.

In *Frewin v. Lewis* (4 Mylne & Craig, 249), the defendants were the Poor Law Commissioners and the guardians of the Holborn Union, under the poor law amendment act. (4 and 5 Will. IV. 76.) Lord Cottenham, in speaking of the jurisdiction of the court over bodies constituted like the poor law commissioners, says that, "If they are assuming to themselves a power over property which the law does not give them, this court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority." * * * "And if, under pretence of an authority which the law does give them to a certain extent, they go beyond the line of their authority, and infringe or violate the rights of others, they become, like all other individuals, amenable to the jurisdiction of this court by injunction."

Is it not clearly going beyond the line of any authority

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vested in the Common Council to deliberately subject every inhabitant of the city to the necessity of paying five cents every time he may ride on the proposed railway, when others will construct the road in the same manner, and with the same accommodations, and charge only three cents? Is there any lawful authority to unnecessarily tax the whole body of the people? Can a two-cent tax be imposed upon each citizen every time he may pass up and down Broadway, from mere caprice, without any assignable cause, and under the power conferred to pitch, pave, regulate, widen, or alter the street?

In the case of the Attorney General against Forbes, the bill was filed in the name of the Attorney General, at the relation of Thomas Tindale, treasurer, and by the relator on behalf of himself and all other of the inhabitants of the county of Bucks (2 Mylne & Craig, 123). The court, in speaking of the question of parties, as well as of its jurisdiction, remarked, that "in informations and proceedings for the purpose of preventing public nuisances, the ordinary course is for the Attorney General to take it on himself to sue, as representing the public; but it is equally certain that individuals who conceive themselves aggrieved may come forward and ask the assistance of the court to prevent a public nuisance, from which they have individually sustained damage."

I can perceive no good reason why a court should not restrain a municipal corporation as well from infringing the public franchise, in a case presenting an unquestionable abuse of power, to the prejudice of individuals and the whole body politic, as from granting mere property to a particular association of individuals, where others stand ready and offer to pay double the price for the same property.

Municipal corporations possess only such powers as are specifically granted by the act of incorporation, and such as are necessary to carry into effect the powers expressly granted. In the appropriation of the funds of the people, they are creatures of limited powers; and when they attempt to appropriate the public funds to purposes not authorized by the charter or by positive law, whether it be done by resolution, ordinance, or under the form of legislation, their act is without authority and

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void. (*Hodges v. City of Buffalo*, 2 Denio, 140; *Halstead v. The Mayor of New York*, 3 Coms. 480.)

An attempt to sell to certain persons the public wharves, piers, and slips, or to lease them for a term of years for a fourth or a tenth of what others offered, and were able to pay, would be a clear abuse of power, and a gross fraud upon the public, which ought to be restrained. If any doubt should be felt whether such an interposition of the court would not be going further than was evidenced by any reported case, none could be entertained that it would not be going further than the prevention of fraud and the protection of the public required; and if the action invoked could not be rested on any better principle, it might be safely placed on the ground that "fraud and damage, coupled together, entitle the injured party to relief in any court of justice."

It is not intended to deny the proposition, that where the exercise of discretion is confided to persons appointed by law, or to a municipal corporation, a court will not attempt to control the exercise of that discretion. But if, under pretence of exercising the discretionary powers thus delegated, they threaten, and are about to do, what is undeniably a gross abuse of power, to the injury, and in fraud of those for whose benefit these delegated powers are to be exercised, and to the injury and in fraud of the rights of individuals and the public, I know of no principle or case which precludes the interference of the court to prevent the threatened injury. (*Oswego Falls Bridge Company v. Fish*, 1 Barb. Ch. 547; *The Attorney General v. Mayor, &c., of Mobile*, 5 Port. 279; *The Attorney General v. The Great Northern Railway Company*, 3 L. & E. 263; *Munt v. Shrewsbury and Chester Railway Company*, id. 144; *Waterman's Eden on Injunction*, vol. ii., p. 259, and notes.)

Assuming, but not conceding, the authority of the Common Council to consider whether it was expedient to grant authority to construct a railway in Broadway on any terms—on which point no opinion is intended to be expressed—it is absurd to insist that, as between two sets of applicants, equally reputable and able, and offering to accept a grant on the same terms, as far as the mode and manner of constructing the road and of

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furnishing and running cars are concerned, there is any pretence for saying that, in the exercise of an honest or intelligent discretion, the grant may be made to one set of applicants, and allow them to charge five cents fare, instead of making it to another set of applicants, who would take it with a prohibition against charging more than three cents fare.

It would be a remarkable abuse of power and violation of duty to make a grant interfering with the right of every citizen to the common and unobstructed use of the street as a highway, and appropriating it in part to the exclusive use and personal emolument of the grantees, and confer on them power to tax every inhabitant of the city and State five cents for riding in the cars, when others would take the grant, and furnish the same accommodations to the public, with power to charge only three cents fare.

If such an abuse of power and breach of trust cannot be restrained, then the making of the grant could not have been restrained, if the purpose had existed and been avowed, to make it for the nominal consideration of one dollar.

That it may be restrained, is incontestable, as I think, both upon principle and authority.

The only serious question upon the facts of any case that may be presented, is, whether the suit should be instituted in the name of some one representing the whole people, or whether it may be brought in the name of an individual. That a suit may be instituted in the name of an individual to restrain a public nuisance, when it occasions special injury to the plaintiff beyond that which the community suffers in common with him, is expressly affirmed in the *Attorney General v. Forbes*, and has been repeatedly decided in reported cases (6 J. Ch. 439; *Corning v. Lansing*, 8 Simons, 193; *Spencer v. London and Birmingham Railroad Company*, Id. 272; *Sampson v. Smith*, Story's Equity, vol. ii., s. 934; *State of Pennsylvania v. Wheeling Bridge Company*, 13 How. Sup. C. R. 566, 576, 608).

In this case the complaint alleged facts which, it is claimed, establish the position, that the construction of this railway would be a special injury to them and other owners of property situate on Broadway. On these facts, the judge who made the order was required, and it became his duty, to exercise his

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judgment and determine whether this claim was well founded. Whether he decided wisely or not, is wholly foreign to the question of his jurisdiction. If he decided erroneously, the proper course of the defendants was to apply to him to vacate the order.

If the alleged facts stated in the complaint were untrue; if they placed the intended action of the Common Council and their motives with respect to it, in an aspect grossly unjust to them, and if the allegations in the complaint were a fraud upon the court, the appropriate course was to show this by affidavit, and move for a summary discharge of the order, and for such action against the plaintiffs as such conduct would make it the duty of the court to take. The remarks made by the court in *Noe v. Gibson*, 7 Paige 513, and in *Russell v. East Anglian Railway Company*, 1 L. and Eq. R. 101, are applicable to the duty of the defendants in this case. In the latter case, the court said:—"I know of no act of this court which may not be questioned in a proper form, and on a proper application; but I think it is not competent for any one to interfere with the possession of a receiver, to disobey an injunction, or to disobey any other order of the court, on the ground that such orders were improvidently made—they must take a proper course to question them, but while they exist they must obey them; I consider the rule to be of such importance to the interests of the public, to the peace and safety of the public, and to the administration of the justice of this court, that it is a rule I shall hold inflexible on all occasions" (p. 106). "This court has to maintain its authority for the benefit of the public, and it can only do that, as I have before said, by supporting its officers in the execution of the orders and processes of the court, and not allowing disobedience and resistance to be the mode of questioning the propriety of the exercise of the discretion of this court" (p. 119).

I shall but briefly notice a few of the many other points argued or suggested.

These resolutions are, in no proper sense of the term, a legislative act; they are, in substance and effect, a contract, by which certain rights and privileges are granted to the associators upon certain terms and conditions, and for a stipulated

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compensation, to the exclusion of all others. It depends entirely upon their will whether any new members shall be let into the association, and upon what terms. If any of the clauses of the resolutions partake of a legislative or by-law character, they are few and unimportant, compared with those which relate to matters purely of contract. The injunction order, by its fair meaning, prohibited the Common Council from granting to Sharp and others, the right or privilege, or in any manner authorizing them, to construct any railway in Broadway.

When the resolutions were passed the grant was made, and the authority was given. Nothing more was to be done, or could be done, by them. It only remained to be seen whether the grantees would file their written acceptance, agreeing to conform thereto. This was immediately filed. Assuming that the act is revocable, it is enough to say, that instead of there being a purpose manifested to revoke it, it was committed against the objections of the mayor, in defiance of the injunction, and resolutions were passed rebuking the judge who made the order for attempting to restrain the doing of the act.

I think there is no just ground for saying that the injunction did not prohibit the acts subsequently done, and certainly none for saying, as the case now stands, that it was not understood as being a direct and positive prohibition against doing what was in fact done.

If it be assumed that the resolutions would confer no authority to take up the pavement and construct a railway, and that all who should undertake to act under such authority would be wrong-doers, an injunction restraining them from doing such acts would not be void. That is the only proceeding which could prevent the necessity of a multiplicity of suits, and in actions sounding merely in damages, it is obvious that no adequate redress could be obtained.

It was only by the members of the Common Council that the inhibited grant could be made. It was by their acts only that the injunction could be violated. A corporation acts only by its officers and agents. When enjoined from doing anything, and the injunction is disobeyed, the disobedience is not the act of the intangible and impalpable statutory being bearing the

corporate name, but of the individuals by whom it acts. Process is served on a corporation by serving it on some of its principal officers, which service is a good commencement of a suit against it. And an order which restrains a corporation from doing an act restrains every officer of it from doing the thing prohibited; and if he does the act knowing that an order has been made prohibiting it, he is chargeable with the consequences of a deliberate violation of an order of the court.

If violated, it is by the officer or agent who performs the prohibited act. If the officers cannot be punished, no one can be. The idea of sequestering the property of a municipal corporation for disobeying an order prohibiting it from doing acts highly injurious to every citizen of the body politic, with a view to compensate those citizens for the injuries thus inflicted, is not intelligible. It is taxing them to pay losses occasioned by a breach of trust committed by those intrusted with exercising the taxing power for their benefit. First every inhabitant of the city is injured,—and, by way of compensation, those who inflicted the injury tax them to its full amount to remunerate them for the loss.

The statute provides that not only “parties to suits” may be punished for any “disobedience to any lawful order, decree, or process” of the court, but that “all other persons” may be. (2 R. S. 534, s. 1, sub. 1, 3, and 8.) It is laid down in books of practice, that, as “an injunction to restrain waste, &c., is usually directed to the party, his servants, workmen, and agents, consequently, if his servants, workmen, or agents, having had notice of the injunction, do anything inhibited by it, they will be guilty of a contempt.” (1 Barb. Ch. p. 634, and notes.) This rule is in terms only of the equivalent import with the third subdivision of the section of the statute above cited. It is also laid down as settled practice, that, so far as the question of liability to punishment for a contempt of court is concerned, it is enough that the party has actually notice of it, although it may not have been regularly served on him. (1 Barb. Ch. pr. 693, notes 1, m, n, and o, and cases there cited.) *McNeil v. Garrat*, 1 Young & Coll. 97, is a recent authority to that effect. *Matthews v. Smith*, 3 Hare, 331, is an authority that a party obtaining the injunction may be punished for pub-

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lishing a notice respecting it, which misrepresents the relative position or character of any of the parties to the cause. In *ex parte* Van Sandau, 1 Phillips, 445, a publication speaking in less severe and disrespectful terms of the judgment of the court than the rebuking resolutions did of the injunction order made in this action, was characterized by Lord Cottenham as "a gross contempt of the court." Lord Hardwick, in a case of the "General Evening Post," 2 Atk. 469, in enumerating the different kinds of contempts, states, as one distinct head of contempt, the "scandalizing of the court." Such an act falls clearly within the spirit, if not the very letter, of 2 R. S. § 10, sub. 6; *id.* 535, § 1, sub. 8; 2 Daniels, Ch. R. 1277; 5 Price, 518; Waterman's Eden on Injunction, p. 94 to 102-2.

The effect of not serving with the injunction order a copy of the affidavit on which it is granted, is, that a defendant may procure the order to be set aside for irregularity. (2 Paige, 394.)

An injunction order regularly granted, of which a party has knowledge, cannot be treated as a nullity, and violated with impunity, before the party obtaining it, in the exercise of due diligence, is able to serve it, nor after it has been served, because the service was not in all respects perfectly regular, where there is no pretence that the person or party disobeying it have not had full and accurate information of the acts forbidden by it.

I am of the opinion that no objection, either of form or substance, has been presented which can exonerate Mr. Sturtevant from the consequences of a deliberate and marked disobedience of the order, or which could furnish a respectable apology for the court for omitting to take such notice of it as is due to the interests of the public, and to a proper administration of justice in behalf of parties to suits, and of the whole community.

Motions for attachment without further argument were then granted against the following aldermen,—Abraham Moore, Dudley Halcy, Jacob F. Oakley, Thomas J. Barr, William M. Tweed, Richard T. Compton, William J. Brisley, Wesley Smith, James M. Bard, Asahel A. Denman, William H. Cornell, John Doherty, and William J. Peck; and against the following

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assistant aldermen,—Josiah W. Brown, Samuel R. Mabbatt, Timothy O'Brien, John F. Rodman, Patrick Breaden, Charles H. Ring, Helmus M. Wells, Edwin Bouton, William H. Wright, Jacob H. Valentine, William McConkey, Joseph Rogers, and Thomas Wheelan.

THE PEOPLE on the relation of THOMAS E. DAVIS and COURTLANDT PALMER v. RICHARD T. COMPTON, OSCAR W. STURTEVANT, ABRAHAM MOORE, DUDLEY HALEY, JACOB F. OAKLEY, THOMAS J. BARR, WM. M. TWEED, WM. J. BRISLEY, WESLEY SMITH, JAS. M. BARD, ASAHEL A. DENMAN, WM. H. CORNELL, JOHN DOHERTY, and WILLIAM J. PECK, Aldermen of the City of New York, and JOSIAH M. BROWN, SAMUEL R. MABBATT, TIMOTHY O'BRIEN, JOHN F. RODMAN, PATRICK BREEDEN, CHAS. H. RING, HELMUS M. WELLS, EDWIN BOUTON, WM. H. WRIGHT, JACOB H. VALENTINE, WM. MCCONKEY, JOSEPH ROGERS, THOS. WHEELAN, Assistant Aldermen of the City and County of New York.

The provisions of Title 13, Chap. 8, Part 3, of the Revised Statutes, not being inconsistent with those of the Code, fall within the exception in sec. 471 of the Code, and are not repealed.

Under that title, no person can be punished as for a contempt, unless it appears that his misconduct has tended to defeat, impair, etc., the rights or remedies of a party in a cause then depending in the court.

But when this misconduct is proved, the powers of the court are not limited to the imposition of such a fine as may be sufficient to indemnify the party aggrieved, or to an imprisonment of the accused for the sole purpose of enforcing the payment of such fine, but extend to the punishment of the accused, when the misconduct is, in its nature, a "criminal contempt."

When the misconduct is an act of disobedience to its lawful process, if the disobedience is shown to be "wilful," the court has the power, and is bound, to punish it as a "criminal contempt."

In such cases, although no actual loss requiring an indemnity is shown, the court may impose a fine not exceeding \$250, and imprison the accused, for a term not exceeding six months, for no other purpose than that of punishment.

Hence, to enable the court to exercise its discretionary power of punishment, interrogatories which are designed to show by the answers of the accused, the true nature and character of his misconduct, must be answered.

Held, therefore, that the defendants were bound to answer whether they had

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voted for certain resolutions, the passage of which was relied on as evidence that their disobedience to an injunction was intentional and wilful.

Held, also, that in all proceedings as for a contempt in a civil action, unless the contempt is shown to be criminal in its nature, the court can enforce no fine beyond the costs and expenses of the relator, except as a compensation for an actual loss.

Held, that each of the defendants, in voting for a resolution of the Common Council, containing a grant to Jacob Sharp, and his associates, had violated the injunction by which such a grant was prohibited.

Held, also, that, not merely the tendency, but the actual effect of this violation, was to impede and prejudice the rights and remedies of the relators in their pending suit against the corporation, by rendering the grantees necessary parties in its further prosecution.

Held, therefore, and adjudged, that each defendant was guilty of the misconduct which, as a contempt of the court, was alleged against him.

When in a proceeding as for a contempt in a civil action, the alleged misconduct is proved, and an actual loss to the relator is shown to have resulted, the court has no discretion as to the amount of the fine to be imposed. The relator is then entitled to a full indemnity, over and above his costs and expenses.

The actual losses to which the provisions of the statute apply, are losses pecuniary in their nature, and capable of being estimated as such, with reasonable certainty.

Held, that as there was no evidence that such a loss had been sustained by the relators, they were entitled only to their costs and expenses.

Held, that the next and necessary inquiry was, whether the misconduct of the defendants was, in its nature, a criminal contempt—in other words, was the result of pardonable ignorance or inadvertence, or wilful and intentional?

When a manifest contempt is proved, a statement in general words that the guilty party acted under the advice of counsel, will never be accepted by the court as excusing or palliating his misconduct.

To enable the court to regard such advice, the names of the counsel, the information that was laid before them, and the exact import of their advice, must be fully stated.

If the advice was written, the writing must be produced—if not, it must be verified by the affidavit of the counsel who gave it.

The belief of a person upon whom an injunction or other order of a court is served, that the court had no jurisdiction, furnishes a very slight, if any excuse for his disobedience.

His only safe course in such a case is to obey, knowing that if the process is wrongfully issued, the law will afford him full redress.

He who resists the order or process of a court of justice, trusting to his own belief of its want of jurisdiction, acts, in all cases, at his own peril, and when proved to be mistaken, is justly punished.

Quere, whether the rule laid down in *Coddington v. Webb* (4 Sand. Sup. C. R. 639), that in order to bring a party into contempt for disobedience to an injunction order, it must have been served upon him by the exhibition of the order itself, at the time of the delivery of a copy, ought, in all cases, to be followed? (Bosworth, J.)

Many reported cases show, that a party may be punished as for a contempt when

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he has designedly done acts, which he knew, at the time, the court had by an order prohibited him from doing; although at the time, the order had not been served nor entered, but had only been directed to be entered. (Bosworth, J.) In order to prevent, in some cases, great and manifest injustice, it seems necessary that the application of the rule laid down in *Coddington v. Webb*, should be restricted. (Bosworth, J.)

Held, by all the judges, upon a full review of all the facts and circumstances of the case, that the misconduct of the defendants in violating the injunction was deliberate and wilful, and therefore, justly punishable as a criminal contempt. Judgment accordingly.

(At Special Term, before DUNE, J., assisted and advised by Bosworth and EMMET, J.J.)

Feb. 19, 26: March 1, 12, 1853.

(Affirmed by same Judges at General Term, March 12, 1853.)

FEB. 19, 1853.—All the defendants appeared under the separate attachments issued against them. The interrogatories were filed on the part of the relators, which the defendants were allowed time to answer, and were recognised to appear again on the 26th instant.

Feb. 26.—Defendants having appeared, the interrogatories and their answers thereto were read. The answers admitted all the material facts set forth in the affidavits upon which the attachments were granted. (*Ante*, pp. 454–464.) It appeared that the resolution making the grant to Jacob Sharp and his associates was adopted in the Board of Aldermen on the evening of the 29th December, and in that of the Assistants on the evening of the 30th; and that each of the defendants had voted for its adoption, with knowledge of the injunction and of its service. Each of the defendants, in his answer to the fourth interrogatory, averred that in voting for the resolution so adopted, he had acted according to his judgment and conscience in the performance of a legislative and public duty enjoined upon him by law; and each of the Assistant Aldermen also stated that he believed at the time, and was so advised by counsel, “that the injunction did not purport and did not mean to restrain him from voting in favor of the said resolution.”

The answer of each defendant concluded with the following protest:—

“And this respondent doth now deny and protest against the jurisdiction of this court to issue the injunction, or to pre-

vent his voting in the discharge of his legislative duty, or to call him to account for his vote upon the said resolution. And in answering these interrogatories, he does not waive any exceptions to the jurisdiction of the court, but denies that he can be held answerable to this court for any vote or act mentioned in these answers.”

The fifth and sixth interrogatories required each of the Aldermen before the court, to answer, whether the resolution introduced by Alderman Sturtevant (*ante*, pp. 463–468) had not been adopted by the Board, and whether he had not himself voted for their adoption?

Alderman Doherty answered, that the resolutions in question had been so adopted, but that he had voted against them; and Alderman W. Smith, admitting that he had voted for the resolutions, expressed his regret, and apologized to the court, for having done so.

Every other Alderman excepted to the interrogatories, and prayed that they might be expunged. The first question, therefore, that arose, was, whether the interrogatories, so excepted to, should be stricken out, or an answer be compelled?

D. D. Field and *Charles O'Connor*, for the defendants, insisted that they were not bound to answer, and moved that the interrogatories excepted to should be expunged as irrelevant. They contended that in a proceeding; as for a contempt in a civil action, the court had no power to punish the accused as for a criminal contempt; but that the sole object of the proceeding was to afford a remedy to the aggrieved party. Hence the inquiry ought to be confined to the facts constituting the contempt, and to those showing a loss sustained by the relators. Here the contempt charged, disobedience to the injunction, was admitted; and, as the subsequent proceedings of the Aldermen had no bearing upon any question that the court could determine, no inquiry into their nature or character ought to be permitted.

J. Van Buren and *G. C. Bronson*, *contra*, said that the argument of their opponents was founded upon an erroneous con-

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struction of the statute, and was contradicted by the adjudged cases; that if it should appear that the disobedience of the defendants was not the result of ignorance or inadvertence, but was deliberate and wilful, the court had not merely the power but was bound to punish it, as a criminal contempt, and was, therefore, bound to inquire into all the circumstances that would throw light upon the true motives and character of the act. Nor was this all. The resolutions of Alderman Sturtevant, to which the interrogatories referred, were not merely evidence that the refusal to obey the injunction was intentional and wilful, but were so expressed that their passage was itself a distinct and aggravated contempt, and, as such, was necessary to be punished. The defendants were, therefore, just as much bound to answer whether they voted for these resolutions, as for that making the grant.

DUER, J.—The provisions of the statute, upon reading them, appear sufficiently clear, but as the question now raised, as to their construction, is of considerable importance, we shall take time to consider it. The defendants must, therefore, be recognised to appear again on Tuesday next (March 1st), and must then be prepared to answer the interrogatories, if we shall hold them to be relevant.

March 1st. DUER, J.—I retain the opinion that the construction of the statute, under which these proceedings are had, is free from any reasonable doubt. (2 R. S., tit. 13, chap. 8, part 3, p. 534.) It is true, the statute is entitled, "Of proceedings, as for contempts, to enforce civil remedies, and to protect the rights of parties in civil actions;" and it is also true, that the court can pronounce no judgment at all unless it appears that the misconduct of the defendant "was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies" of the relator in a pending action. (§ 20, 2 R. S. 538.) And it is from these circumstances that the argument which has been addressed to us on behalf of the defendants, who have excepted to the fifth and sixth interrogatories, derives all its plausibility. It is evident, however, from other provisions in the statute, that the court may impose a penalty, even when no indemnity, beyond his costs and expenses, is due to the party

aggrieved. When the relator is shown to have sustained an actual loss, he must be indemnified by the imposition of a fine equal to the extent of his loss, in addition to his costs and expenses (§ 21); but in cases where no actual loss is proved, the court may, in its discretion, impose a fine not exceeding \$250, beyond costs and expenses (§ 22); and may imprison the defendant for "a reasonable time, not exceeding six months (§ 25); and in such cases, neither the fine nor the imprisonment can have any object other than punishment. Hence, to enable the court, in these cases, to exercise properly its discretion, an inquiry into all the circumstances that may define the misconduct of the defendant, as criminal or excusable, is not only relevant, but necessary. I shall not pursue these remarks, since Mr. Justice Bosworth has prepared an advisory opinion, in which the provisions of the statute, and prior decisions bearing on their construction, are carefully and fully examined, and this opinion I adopt as that of the court.

BOSWORTH, J.—The specific question under consideration is, shall the defendants be required to answer the fifth and sixth interrogatories? This proceeding is based on an allegation, that the defendants have disobeyed an injunction order made by a judge of the court, in an action pending therein. The papers on which the attachment was issued, allege that the defendants, members of the Board of Aldermen, in addition to disobeying the order, voted for a certain preamble and resolutions relating to the issuing of the injunction, and the acts prohibited by it, and professing to state the grounds on which they assumed to disobey it. The fifth and sixth interrogatories call upon them to answer whether they did not vote for such preamble and resolutions? and whether by such votes they were not adopted by the board of which they were severally then members? To determine whether they should be required to answer, it is necessary to look at the nature of the present proceeding; the ends that may properly be accomplished by it; and whether the fact of having voted, or having omitted to vote for such preamble and resolution, is one that can legitimately be taken into consideration in the final disposition of this matter, and which can justly affect the ultimate decision.

The Code provides, that the order which has been disobeyed,

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may be enforced as the order of "the court." (Code, sec. 218.) Section 471 declares, that until the Legislature otherwise provides, the Code "shall not affect any proceedings provided for by" chapter 8, of the third part of the Revised Statutes, excluding the second and twelfth titles thereof, unless some provision thereof is plainly inconsistent with the Code, and that any such provision shall be deemed repealed. These proceedings are instituted under the thirteenth title of that chapter of the Revised Statutes. The provisions of the Revised Statutes must, therefore, furnish a solution of the question under consideration. They provide that "every court of record shall have power to punish, as for a criminal contempt," persons guilty of certain acts; and among others, "wilful disobedience of any process or order lawfully issued or made by it." (2 R. S. 278, sec. 20, sub. 4.) This class of contempts may be punished by a fine not exceeding two hundred and fifty dollars, and by imprisonment not exceeding thirty days. This punishment may be inflicted irrespective of the consideration of any injury done to a party to the action in which the process was issued, or the order made, and is to be fixed irrespective of any such consideration. For all contempts of this character, the offending party may be indicted (2 R. S. 692, § 14), as for a misdemeanor. If subsequently indicted, the court before which a conviction is had, on such indictment, is required, in forming its sentence, to take into consideration the punishment before inflicted, in the proceedings as for a criminal contempt. (2 R. S. 278, § 14.) The revisors, in their notes upon this title (tit. 2, of chap. 3, of part 3,) remark, that a "solid and obvious distinction exists between contempts, strictly such, and those offences which go by that name, but which are punished as contempts only for the purpose of enforcing some civil remedy. This distinction has been observed, and the former are intended to be included in the preceding sections. The latter class are treated of subsequently, among miscellaneous proceedings in civil cases." (3 R. S. 695, foot of the page.) The statute in relation to the latter class (2 R. S. 534, § 1) provides, "that every court of record shall have power to punish, by fine and imprisonment, or either, any neglect or violation of duty, or any misconduct, by which the rights or remedies of a party in a cause or matter depending in

such court, may be defeated, impaired, impeded, or prejudiced in certain specified cases; and among others, "for disobedience of any process of such court, or of any lawful order thereof, or of any lawful order of a judge of such court." It will be noted, that the expression here used, is "for disobedience" of a lawful order, omitting the word "wilful." To punish as for a criminal contempt, there must have been a "wilful disobedience." (2 R. S. 278, § 10, sub. 3.) Although the disobedience was not wilful, a party offending may be punished in the cases prescribed in 2 R. S. 534, § 1, if his neglect of duty was such that, by it, the rights or remedies of a party to a cause might be defeated, impaired, impeded, or prejudiced. But although in such a case, the disobedience might have resulted from a misapprehension of duty, or from the advice of counsel, honestly given, and implicitly believed, that the act which the law adjudges to be disobedience was not prohibited, yet the disobedience may have been wilful, and have been accompanied with such acts and circumstances as would show a purpose to make the disobedience studiously offensive to the court, and to publicly manifest by it a contemptuous disregard of its order and authority. If the latter should be the true nature and character of the act of disobedience, is it to be overlooked, and are all interrogatories calling for answers that might establish it, to be suppressed? The 20th section declares, that if the court adjudges the defendant to have been guilty of the misconduct alleged, and that "it was calculated to or actually did" produce certain results, "it shall proceed to impose a fine, or to imprison him, or both, as the nature of the case shall require." If actual loss has been produced, a fine shall be imposed, that will indemnify the party, and satisfy his costs and expenses (sec. 21). The statute is imperative, that in case of actual loss, a fine sufficient to indemnify and to satisfy costs and expenses, must be imposed. In all other cases, that is, in those cases in which no actual loss is shown, but in which it is adjudged that the act of disobedience was calculated to defeat, impair, impede, or prejudice the rights or remedies of any party, the fine shall not exceed \$250 over and above the costs and expenses of the proceedings (sec. 22). For what, it may be asked, is this fine to be imposed in a case in which no actual loss has been sustained? and by what con-

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siderations is a court to be governed in properly determining whether it shall be \$1 or \$250? This question can be more advisedly answered on a reference to other provisions of this statute.

It will be noted that sections 21 and 22 speak only of the fine to be imposed, and nothing in relation to the imprisonment. Section 20 gives the power to fine and imprison. Sections 23 and 24 relate to the matter of imprisonment, and embrace two classes of cases. The 23d regulates the extent of the imprisonment, where the misconduct complained of consists in the omission to perform some act or duty which it is still in the power of the offending party to perform; and provides that, in such cases, he shall be imprisoned only until he shall have performed such act or duty, and paid such fine as shall be imposed, and the costs and expenses of the proceedings. In such a case, the order and process of commitment must specify the act to be done, and the amount of fine and expenses to be paid. If able to pay the latter, the term of his imprisonment will depend exclusively on his own volition; for when he has paid the fine and expenses, and done the act, or performed the duty, it will terminate, and he will be entitled to a discharge.

In all other cases; that is, in all cases except those in which the misconduct alleged consists in the omission to perform some act or duty, which it is yet in the power of the defendant to perform, he may be punished by imprisonment, "for some reasonable time, not exceeding six months," and until the expenses of the proceedings are paid; and also, if a fine be imposed, until such fine be paid, (*ib.* § 25.) The power to punish by imprisonment, conferred by section 20, so far as the imprisonment is ordered by way of punishment, is limited by section 25, to six months; but if the fine and expenses are not paid, it would last through life but for the act of 1843, chapter 9. This limitation of the power to imprison for a period not exceeding six months, has no connexion with the imprisonment ordered to compel the payment of the fine imposed, and of the costs and expenses of the proceedings. For if the power to punish by imprisonment in this class of cases, is a power to be exercised for the sole purpose of compelling payment of the fine and expenses, then it would follow—as a limit

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is set to the power to imprison, and the imprisonment cannot exceed six months—that at the end of that period, the offending party must be discharged from imprisonment, whether the fine and expenses are paid or not. Yet, independent of the express language of the statute, that where the punishment adjudged is merely a fine and payment of the expenses, the imprisonment must continue until they are paid, it has been uniformly held that no power was competent to determine it short of that period, and hence the act of 1843 (chap. 9) was passed, authorizing a discharge on proof of inability to do the things required. The imprisonment authorized by section 25, within the limit of six months, if imposed at all, is by way of punishment, and must be endured, even though the fine and expenses be paid the moment the decision is made. This imprisonment for a reasonable time, not exceeding six months, may be imposed in every case in which the misconduct alleged calls for it, except in the cases specified in section 23. In that class of cases, the misconduct or disobedience consists in not having acted at all—in all others, in having actually done something prohibited. It may be thought singular, that, in the case of a criminal contempt, and in punishing it as such, the power to imprison should be restricted to thirty days; and that in proceeding to punish as for a contempt, injuries to civil rights, the power to imprison for a longer period should have been conferred. Yet the revisors, in their notes to sections 23 to 25 of 2 R. S. 538, make this comment:—"In cases of criminal contempt, by sec. 11, title 2, of chap. 3, of this part, the imprisonment is limited to thirty days. Perhaps there may be cases where a longer imprisonment for injuries to civil rights, ought to be allowed." These three sections were enacted in the form in which they were proposed (3 R. S. 773, 2d ed.). If, then, a fine may be imposed as a punishment, where no actual loss has been occasioned by the disobedience; if imprisonment not exceeding six months may be ordered with the same view; if the imprisonment, when ordered, is to be for only a reasonable period, it is obvious that some principle exists, by which the court ought to be guided in discriminating between cases, and by which in some it may properly fine to the extent of \$250, while in others the fine

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should be nominal only, and by which it may determine whether imprisonment should be ordered as a punishment, and what term would be a reasonable period in any particular case. The reported cases show, that courts have regarded it as free from doubt, that the nature of the disobedience, as whether it was wilful or otherwise, was one of the matters to be regarded in determining whether any and what punishment should be inflicted beyond the imposition of a fine sufficient to indemnify an injured party for his loss and to satisfy his expenses. In *Hawley v. Bennett*, 4 Paige, 164, the Chancellor said, "that so far as the rights of a party have been affected by the breach of an injunction, it is no defence to the person who has been guilty of violating the same, that he did it under the advice of counsel; although, if he has acted in good faith, it may be sufficient to protect him from punishment as for a criminal contempt." In *Rogers v. Paterson*, 4 Paige, 456, the Chancellor restated the principle, thus: "And the advice of counsel cannot protect a party in disobeying an order of the court, so as to prevent the adverse party, whose remedy is impaired or impeded by such disobedience, from taking the necessary steps to compel a compliance with the order; although the fact that the party has acted in good faith, and under the advice of his counsel, may be sufficient to prevent the imposition of a fine beyond the actual amount of the injury sustained by the adverse party, and the necessary expenses of the proceedings."

In *Sullivan v. Judah*, 4 Paige, 447, he said, "In this case, it is evident that the complainant has sustained no injury by the proceedings of the defendants, although they have proceeded in direct opposition to the injunction. And the excuse offered by them, is sufficient to prevent the imposition of any considerable fine as a punishment for contemning the process of the court."

In *Lansing v. Eaton*, 7 Paige, 367, he remarked that, "The fact that the defendants acted under the erroneous advice of counsel, to whom they applied for information, how they could elude the justice of this court, and, at the same time, avoid punishment for a breach of the injunction, cannot protect them from a fine sufficient to compensate the adverse parties for the injuries they have sustained by the wrongful acts complained

of; though it may furnish a ground to justify the court, in refusing to inflict a further punishment upon the offenders for a violation of its order."

In the *Albany City Bank vs. Schermerhorn*, 9 Paige, 379, in which the Chancellor, on appeal, reversed a Vice-Chancellor's order, adjudging parties guilty of a contempt, he stated that an order of conviction should direct "to whom the fine is to be paid, or what is to be done with such fine when paid, &c., so that the order, and the process of commitment founded thereon, may show the nature of the conviction, and what the defendant is to do to entitle himself to a discharge from imprisonment."

In the *People ex rel. Backus vs. Spalding*, 10 Paige, 284, the report of the case shows that Spalding had been convicted, by a Vice-Chancellor, of a wilful breach of an injunction issued by a creditor's bill filed against him. After he had been committed, he was discharged by a Supreme Court commission, in proceedings under a habeas corpus. The Vice-Chancellor made an order for a re-commitment, on the ground that the commissioner had no jurisdiction in that case to order his discharge. From the order re-committing him, Spalding appealed to the Chancellor, who affirmed the order. An appeal was taken to the court for the Correction of Errors. That court affirmed the judgment of the Chancellor.

Chief Justice Nelson, in delivering the opinion of the court, remarked, that "the act, for which the appellant had thus been adjudged guilty, is a criminal offence under the revised statutes, and was so before at the common law, subjecting the offender to indictment; and, on conviction, to fine and imprisonment." (2 R. S. 692, § 14, ib. 697; 4 Bl. Comm. 139.) "In cases confessedly criminal and indictable, the penalties for which would ordinarily go for the benefit of the people, the courts are authorized to impose a fine, with a view to the indemnity of the party aggrieved, his acceptance of it being declared a bar to any private action for the injury. The fine, however, is no less a penalty for a criminal act, than if inflicted for the benefit of the people; but the imposition of it in the way prescribed, accomplishes the double purpose of punishment for the misconduct on the one hand, and indemnity to the aggrieved party on the other." (7 Hill, 301.) In that case,

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the court below adjudged, that an actual loss had been occasioned by the disobedience; and although the reports of the case show that he was fined for the contempt to the amount of \$3,000, and the costs and expenses in relation to the contempt to the amount of \$196 51, it does not appear how much was due on the judgment on which the creditor's bill was filed. The order of conviction directed the costs to be paid to the solicitor of the relator, and the \$3,000 to be paid to the clerk of the court, subject to the further order of the court. (4 How. S. C. R. (U. S.) 21.) In that case, Spalding was adjudged, on the 21st of March, 1842, to have wilfully violated the injunction. On the 7th of May, 1842, he was arrested on an *alias mittimus*; and continued under arrest until the 29th of September following, when he was discharged by a Supreme Court commissioner, on the ground that a discharge in bankruptcy, granted on the 17th of September, relieved him from the fine, costs, and expenses, which he had been ordered to pay. In the Court for the Correction of Errors, it was contended, on behalf of Spalding, that the proceedings under which the fine had been imposed, being under the Revised Statutes, providing for the enforcement of civil remedies, should, though in form criminal, be regarded simply as another remedy for collecting the debt claimed in the chancery suit, and upon which they had been founded; that the fine was, in fact, imposed for the purpose of being applied to the extinguishment of the debt, whenever, in the progress of the suit, it should have been established, but that it was incidental to the debt, and dependent upon it; and that a discharge of the one, must necessarily discharge the other. (7 Hill, 302, 303.) It was in answer to this argument, that the remarks of Chief Justice Nelson, above quoted, were made. The question was not presented, nor was any suggestion made by the court, in relation to the point, whether in any case imprisonment might properly be ordered as a punishment, in addition to the imposition of a fine; nor whether a fine could be imposed merely as a punishment, in a case in which one was imposed to indemnify against actual loss. Section 22 is express, that a fine may be imposed not exceeding \$250, over and above the costs and expenses of the proceedings, even in those cases where no actual loss was

occasioned by the disobedience. Such a fine, if imposed, must necessarily be imposed, merely as a punishment, and not as an indemnity; and, when paid, goes to the benefit of the public, and not to the complaining party. *Macey vs. Jordan*, 2 Hill, 570, was an appeal to the court of last resort, from an adjudication of the Chancellor, that Macey had wilfully violated an injunction issued on a creditor's bill filed against him, and fining him to the amount of the respondent's debt, and the costs of the proceedings. The injunction was served on the 23d of November, 1838. On the 5th of December following, Macey violated it, by making an assignment of his property. On the 6th of August, 1842, he was discharged under the Bankrupt Act. In October, 1843, an attachment was applied for, over a year after obtaining his discharge in bankruptcy, to arrest him for the violation of the injunction. In March, 1844, he was adjudged guilty of the contempt alleged to have been committed in December, 1838, some five years prior to the issuing of the attachment. Justice Jewett, in the opinion delivered by him, remarks, that "the cause for which the fine was imposed, was the criminal contempt which the appellant was adjudged to have committed in violating the injunction." (2 R. S. 278, § 10.) The punishment for such an offence, is by fine or imprisonment, or both, according to the aggravation of the case; and where a party has suffered by the misconduct which constitutes the offence, the fine is to be paid to such party. (2 R. S. 528, § 20 to 22.) It may be true, that if the debt had been paid subsequently to the violation of the injunction, no punishment, or only a nominal one, could have been imposed."

"The proceeding, after the attachment issued, was for a criminal offence; and although the respondent might incidentally derive a benefit from the conviction, still the proceeding was not upon the original demand, or for the recovery of the debt." The judgment of the Chancellor was affirmed, by a vote of twenty-two to two.

The views expressed of these proceedings in the cases referred to, do not at all conflict, nor do they intimate any interpretation of the statute at variance with the ordinary and natural meaning of its terms, if each opinion cited is read, as all opinions should be, with reference to the particular facts of the

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case in which it was pronounced. They seem to show a uniform understanding of the statute, that the disobedience of an order may not have been wilful; that it may have arisen from an honest misapprehension by the offending party of the nature of the act which he did; and may have occurred in good faith, and in the belief that it was not disobedience—that in such a case, if actual loss results from the disobedience, the court has no discretion which will absolve it from imposing a fine which will indemnify the injured party for the loss. That in such a case, no fine should be imposed or imprisonment ordered, purely and solely as a punishment, beyond the punishment that may result from the imposition of a fine sufficient to indemnify against the actual loss, and to satisfy the expenses of the proceedings. That the disobedience may also have been wilful and designedly contemptuous; and in such case, the contempt is criminal, and may be punished according to the aggravation of the case. The opinion is intimated by some judges that, in case the contempt is criminal, and actual loss ensues, the fine imposed should be regulated in its amount with that of the actual loss, and is to be paid to the party injured. But no opinion is intimated, that no imprisonment can be superadded in such a case, solely for the purpose of punishment.

It seems to be clear, also, that in case of wilful disobedience, although no actual loss is suffered, a fine not exceeding \$250 may be imposed, under section twenty-two, solely as a punishment of the criminal offence; and that imprisonment may be ordered, under section twenty-five, for a reasonable period—“as the nature of the case shall require.” (Section 20, *ib.*) If imprisonment cannot be ordered under section twenty-five, solely with that view, then that part of the section which prescribes the limit of six months, is nugatory; for the reason, that imprisonment ordered to coerce the payment of the fine, must continue until it is paid; while this section expressly provides, that the imprisonment shall be “until the costs and expenses of the proceedings are paid; and also, if a fine shall be imposed, until such fine be paid;” and this is in addition to an imprisonment ordered for some reasonable time not exceeding six months; which, of course, must terminate when the

period expires—although the fine has not been paid, and cannot terminate before, even if it has been paid—while the imprisonment may continue for years afterwards, and until the fine is paid; but is continued simply because it is not paid. I admit an inability to conjecture what case may arise, in which it would be proper, in addition to imposing a fine that would indemnify the injured party, and satisfy his costs and expenses, to order an imprisonment as a punishment exceeding in duration that which the court could order, if the proceeding was one simply to punish the offender for a criminal contempt. The revisors, however, suggested that such cases might arise, and submitted sections, framed with a view to confer such power; and the Legislature enacted the sections as proposed, and under this exposition of the views with which they were framed.

What effect the passage of the resolutions referred to in the interrogatories should justly have upon the final judgment of the court, is a question not now under consideration; and is one in respect to which the parties should be heard, and which should be carefully considered, with all other attending circumstances, before any opinion is formed. But it must be obvious, that the passage of those resolutions unexplained is pertinent to the question whether the disobedience was wilful, or was an act done in good faith, and in the honest belief that nothing prohibited by the injunction was done by the defendant in voting for the resolutions referred to in the fourth interrogatory. If they tend to show, that the acts which are alleged to constitute a violation of the injunction were done in good faith, and in the honest belief that they did not violate it, then, according to all cases, and upon principle, there should be neither fine nor imprisonment, for the purpose of punishment, if no actual loss has resulted to the relators. There should be neither fine nor imprisonment, for the very reason that the act of disobedience was not wilful, but was done in good faith and without any intention to disobey. If this be so, then it would seem to be equally incontrovertible, that if, unexplained, they tend to show that the disobedience was deliberate and designed, and that the acts done were understood as being expressly prohibited by it, such a consideration cannot be overlooked, in

any final adjudication, based on correct principles and justly adapted to the nature of the case. I should not have deemed it necessary to have examined or discussed this question so fully, were it not of the highest importance, that in every case that may arise, these proceedings should be conducted throughout on principles applicable equally to the case of all parties offending, and with a correct understanding of the meaning and object of the statute under which they are prosecuted; and that I felt it incumbent, from the confidence with which eminent counsel avowed the views they presented, to distrust the accuracy of my own previous convictions, and to consider, upon a full examination, whether they were well founded. On such examination, I cannot resist the conclusion that the interrogatories excepted to are pertinent and proper; and that it is the duty of the defendants to answer them.

The court then decided that the interrogatories excepted to must be immediately answered.

Alderman Sturtevant then filed the following answer, with which those of the other aldermen (which were also filed) corresponded in substance.

To the fifth interrogatory he saith, that he did at such meeting, and immediately after the adoption of the said resolution, move the adoption of the preamble and resolutions, of which a copy marked C. is annexed to the complaint.

That in making that motion, his only motive was to vindicate the dignity and assert the rights of the Common Council of the city of New York, and of their whole constituency; which dignity and rights he believed to be unjustly and illegally assailed by the injunction and complaint on which it was founded, of a portion of the contents of which he had heard through public rumor. That the motives of the members of the Common Council were aspersed, and their self-respect wounded by the charges of the said complaint; and that the circumstances under which the injunction was obtained and served, were highly irritating.

The resolution had been pending nearly two months; the chambers of the judges were within a few rods of the chambers of the Common Council and the mayor's and other public offices of the city, and in the same building with the office of

the Corporation counsel. There had been ample opportunity to apply for the injunction before, and even at the time when it was applied for, there was time enough for notice to the Corporation, and hearing them, before granting the injunction; that the Common Council was to expire on the 3d January, 1853; and when the respondent heard that an injunction had been granted without notice, and continued beyond the time when the Common Council was to expire, and requiring the defendants, as if in mockery, to show cause against it, on the 12th of January, he believed that it was a device of the opponents of the road to defeat the resolution by indirection, and virtually, get the case decided without a trial.

This respondent also believed, as he still believes, that the court had no jurisdiction to grant the injunction; and knowing that it is the right of every citizen to question and defy the exercise of illegal power, he did, under the influence of all these considerations, move and vote for the said resolutions; but, in doing so, he did by no means intend any disrespect to Judge Campbell or to question the exercise of any rightful power, or offer any resistance to the law, or any contempt to the lawful authority of the court.

In answer to the sixth interrogatory he said, that the said preamble and resolutions were adopted by the board of aldermen.

These answers being read, the questions as to the nature and extent of the punishment that ought to be imposed, were argued *in extenso* by the counsel of the parties.

March 12th.—The defendants being present, the court proceeded to judgment; and the judges delivered the following opinions:—

BY THE COURT. DUER, J.—We are now to determine whether the members of the Common Council, who have been severally brought before us by a process of attachment, have been guilty of the misconduct that is alleged against them, and if so, whether this misconduct has operated, or was calculated “to defeat, impair, impede, or prejudice the rights or remedies” of the relators in the prosecution of their original and pending suit (2 R.

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S. sec. 20, p. 538). These are not the only questions that we have found it necessary to consider and decide; but they are the first in the order of the judgment now to be pronounced.

The misconduct that is alleged against all the defendants in the affidavits upon which the motions for the attachments were founded, and in the interrogatories that have since been filed, is that of a contempt of the authority of this court, by an act of positive disobedience to its lawful order; and the aldermen who are before us, with the exception of Alderman Doherty, are also charged with having given their assent, by their votes, to the passage of certain resolutions, not only denouncing the order, which they were required to obey, as an unprecedented act of usurped authority, but containing scandalous imputations upon the conduct and motives of the judge by whom the order was issued. These resolutions are set forth at large in the proceedings, and it has been insisted that they are evidence, not merely in support of the principal charge, but of a distinct and substantive offence, which may and ought to be treated as a wilful and criminal contempt.

It is manifest, that we cannot do otherwise than adjudge each of the defendants to have been guilty of the alleged contempt, by his personal refusal to obey the order of injunction which has been so publicly violated, if we adhere to the opinion, that the order was rightfully issued, and properly served, and individually binding; and upon these questions it is only necessary now to say, that the convictions which we fully entertained, and have endeavored fully to express, are wholly unchanged—they have not been weakened, but confirmed, by subsequent reflection and research. We have held, and now hold, that the order of injunction commanded each individual member of the Common Council to refrain from aiding or assisting in the performance of the corporate act which the order prohibited; and, consequently, that it was violated by every member who voted for the resolution in favor of Jacob Sharp and his associates, with the intent that the grant, which the resolution contained, should become, by its immediate acceptance, operative and effectual. Each of the defendants, in his answer to the fourth interrogatory, has admitted that he voted for this resolution—nor has one of them attempted to

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deny that he so voted, with the intent that the resolution should take effect as an immediate and positive grant, and in the confident expectation, that by the acceptance of the grantees, it would become so. The meaning and motives of the entire transaction are indeed too apparent to admit of doubt or denial. It is evident from the papers before us, that the written acceptance of the grantees must have been prepared and signed before the resolution was finally adopted, since, as soon as the anticipated final vote was taken, it was delivered and filed.

Nor is any argument requisite to show that the misconduct of the defendants, in violating the injunction, has tended to impede and prejudice the rights and remedies of the relators in the prosecution of their suit. Such was not merely its tendency and design, but such has been its actual effect. If the grant forbidden by the injunction had not been made, all the relief that the relators seek might be obtained in the present suit. The grant to Jacob Sharp and his associates has altered, in some degree, the nature of the relief to which the relators may be entitled. A decree, not merely prohibiting, but vacating the grant, must now be sought; and hence the grantees are necessary parties in the further prosecution of the suit. They are now the real parties in interest, and consequently, a final decree affecting their rights as such, cannot be made, until they shall have been brought in as defendants, by a supplemental complaint. The necessity of a proceeding which impedes, and, by the expense and delay which it creates, prejudices, the remedy of the relators, as plaintiffs in the suit, has arisen solely from the misconduct of the defendants now before us.

Reserving for separate consideration the resolutions passed by the Board of Aldermen, it follows from the observations that have now been made, that each of the defendants, by violating the order of injunction, has been guilty of the misconduct alleged against him, and which, as a contempt of the court, I am required to punish. Such accordingly, in relation to each of them, is the judgment that I now pronounce.

The statute applicable to the case makes it the duty of the court, when the alleged misconduct of a defendant, prosecuted for contempt, and its effects or tendency, have been proved to its satisfaction, to impose upon him the penalty of a fine or

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imprisonment, or both, in its discretion, and as the nature of the case may require. (2 R. S. p. 538, sec. 20.) When the guilt is proved, a penalty must follow; but the discretion of the court, in fixing the penalty, must be exercised within certain limits, both in respect to the amount of the fine, and the duration of the imprisonment that may be imposed; and that discretion, it must also be observed, is not arbitrary, but judicial; and its exercise must therefore be governed by those considerations by which alone the mind of a judge may reasonably and justly be influenced. Such is the meaning of the statute in directing that the penalty must be such as the "nature of the case may require."

What, then, is the penalty that the nature of this case, it may justly be said, requires us to impose? What the measure of punishment with which the misconduct of the defendants, in their public disobedience to a positive and most intelligible order of the court, ought to be visited? Banishing from our minds all extraneous and personal considerations, and fixing our attention alone upon those which arise upon the evidence, and which mark the character, and throw light upon the motives, of the transaction, what is the answer that these questions ought to receive? The answer, that we deem to be appropriate and necessary, and the conclusions at which we have arrived, I shall proceed to state, as the judgment of my associates, as well as my own; and it is due to the public and to the defendants that the reasons by which we have been governed, in forming our judgment, shall be fully explained. This is one of the occasions on which the interests of truth and justice require, that the judgment of the court shall not merely be declared, but vindicated.

Had it been proved, that the relators had sustained an actual loss, from the misconduct of the defendants, we should have had no discretion as to the amount of the fine to be imposed. They would then have been entitled to a full indemnity, over and above their costs and expenses; and, consequently, a fine, which, equally divided among the defendants, would have secured that indemnity, must have been imposed. (2 R. S. p. 536, sec. 21.) But we think, that no evidence has been given of an actual loss, for which a definite sum, as a compensation, may

be awarded; and it is only to such losses—losses pecuniary in their nature, and the amount of which may be estimated with certainty—that the provisions of the statute can, in our opinion, be held to apply. The relators, therefore, are entitled only to their costs and expenses.

In cases in which the defendant is adjudged to have been guilty of the alleged contempt, but no loss, beyond his costs and expenses, to which in all cases he is entitled, is shown to have resulted to the prosecuting party, the court may impose a fine not exceeding \$250, and imprison the defendant for a period not exceeding six months, or, in the exercise of its discretion, may inflict either penalty in its full, or a limited, extent (2 R. S. p. 537, secs. 22, 23, 25). But we are clear in the opinion that in those cases no penalty whatever, beyond the costs and expenses of the prosecution, ought to be imposed, unless it appears that the misconduct, as proved, was, in its nature, a criminal contempt, which, as such, the court, for the sake of a public example, and the necessary maintenance of its own rights and authority, is bound to punish; and such, we apprehend, is the settled construction of the statute.

Hence, in all these cases, the first necessary inquiry is, whether the alleged contempt was wilful and intentional, or accidental and undesigned? the result of pardonable ignorance, error, or inadvertence? or a deliberate act of conscious disobedience? And when the disobedience is shown to have been intentional, and the question of a fitting penalty is alone to be determined, all the circumstances, by which the offence was palliated or aggravated, must be considered, in determining the measure of its punishment; and, in the discharge of this duty, the answers of the defendants to the interrogatories demand special attention; whether the language is that of regret and apology, or of contumacy and defiance, is a material inquiry.

These views have been present to our minds in examining the cases now before us, and we lament to say that we have been unable to resist the conviction that the disobedience of the defendants, each and all of them, to the order of injunction, was not the result of accident or inadvertence, but was intentional, deliberate, and wilful. I mean “wilful” in the sense of

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a determination to do what is known to be forbidden. In the plainest terms the order forbade them to grant a certain privilege to Jacob Sharp and his associates—and with a full knowledge of the order, its import and object, this very grant they made. The resolution which they adopted was this grant; and hence, they could not for a moment have doubted that an order forbidding them to make the grant, forbade them to pass the resolution. Whether they acted in the belief that their disobedience to the order could be justified, is a different question; but such a defence is itself an admission that they fully understood the mandate, which they were resolved to violate. We desire to put as favorable a construction upon the conduct of the defendants as it can possibly bear; but to our minds, there is no escape from the conclusion that they have, intentionally and knowingly, done the act which the order of this court commanded them not to do.

Nor let it be said, that in stating this as our undoubting conviction, we disregard and reject, as unworthy of credit, the declaration made by each of the defendants, in his answer to the fourth interrogatory, namely: that “he believed that the injunction did not purport, nor mean to restrain them from voting, in favor of the resolution” making the grant which was prohibited; for although we are forced to regard this declaration as ambiguous and evasive, it is not necessary to reject it as wholly untrue. It admits of an interpretation which may reconcile it with the conviction we have expressed, while, if understood in the obvious sense, which the words seem intended to suggest, it cannot be reconciled with the public acts and declarations of the Board of Aldermen, at the very time, to which this declaration, in their answers, refers. And were we reduced to the painful necessity of an election, it is to contemporaneous declarations, made for the very purpose of explaining and vindicating this act of disobedience to the process of the court, that our confidence and credit would in preference be given. The resolutions introduced by Alderman Sturtevant, and voted for by all the aldermen, with one exception, who are now before us, are conclusive evidence that the order of injunction was then understood by them in the very sense that we have given to it, and that, thus understanding, they meant to violate it.

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These resolutions denounced the order of injunction as an illegal restraint upon the legislative action of the Common Council, and, upon that ground, proclaimed a determination utterly to disregard it. But if the injunction was then understood by them as neither prohibiting in terms, nor meaning to restrain the members of the Common Council, from voting for the resolution in favor of J. Sharp and his associates, with the intention that the resolution, when adopted, should operate as a grant, it imposed no restraint whatever upon their legislative action, nor by their voting as they did, was it at all disregarded. Indeed, upon this construction, the Common Council, as such, could not disregard it. It is painful, but necessary, to state the alternative. Either the injunction, when served, was understood by Alderman Sturtevant, and those who acted with him, as restraining them from voting in favor of the resolution making the grant it prohibited, or it was not. If it was, then the declaration they have now made, in its obvious sense, asserts the existence of a belief which they never entertained. If it was not, then his resolutions vindicating the rights and dignity of the Common Council were based upon an assertion which he and those who voted with him then believed to be false, and were, consequently, a most gratuitous as well as intemperate attack upon the conduct and motives of the judge by whom the injunction was issued. And, upon this supposition, the passage of the resolutions was a malicious and wanton insult—a contempt as criminal and aggravated, in its nature, as a court of justice has ever been bound to notice, or compelled to punish. But this supposition we do not hesitate to reject, for although the resolutions of Alderman Sturtevant may convey imputations, and be expressed in terms, that render them justly liable to animadversion and censure, yet we do not at all doubt that the injunction was regarded, not only by those who voted for those resolutions, but by every member of the Common Council, as restraining their legislative action, by enjoining them not to adopt by their votes the grant, which it described and prohibited. It is manifest, however, that if Alderman Sturtevant, and the Aldermen who voted with him, acted in this belief, the credit of their veracity can only be saved, by construing their present declaration, not in its obvious, but in a

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very qualified sense; and it is this qualified and charitable interpretation, therefore, that we adopt. The order of injunction commanded the Corporation and its members to desist and refrain from making a certain grant, but did not command the members of the Common Council not to vote in favor of the resolution they were about to re-consider, unless the intended and necessary effect of its adoption was to make the grant that was forbidden. Such, however, was not its necessary effect; since, when they voted for the resolution, they might at the same time have suspended its effect, as a grant, until the injunction was dissolved, or, until the happening of that event, have forbidden the acceptance of the resolution by the grantees, or the filing of that acceptance by their own clerk; and had either of these courses been followed, there would have been no intentional breach of the injunction—no conflict between the Common Council and the judiciary would have ensued, the city would have been saved from the disgrace of the unseemly spectacle that we now witness, and the judges of this court have been relieved from the discharge of a most painful duty.

Why a course of proceeding, by which all these consequences would have been avoided, was not in fact adopted, it is unnecessary and would be irrelevant, now to inquire. We are, however, told by the Assistant Aldermen that they not only believed, but were advised by counsel, that the injunction did not purport nor mean to restrain them from voting for the resolution which they reconsidered and adopted; but we are bound to presume, that this advice was given, and was understood to be given in the belief that one or other of the courses, that we have indicated, would be followed—in other words, that although the resolution might be passed, its effect, as a grant, would be suspended, since we find it impossible to believe that any counsel could have advised them that if they adopted the resolution, so as to render it effectual, as a grant, the injunction would not be violated. No counsel could have advised them that the injunction would not be broken, if they made the grant, which in plain words it commanded and enjoined them to desist from making. While upon this subject, we deem it necessary to observe, that the advice of counsel, when stated in general terms, as it here is, will never be accepted by this

court, as excusing or palliating a contempt, which is otherwise manifest or proved. The advice, when thus stated, will never be permitted to affect our decision. To enable us to regard it, at all, the names of the counsel must be given, and the information that was laid before them, and the exact import of their advice, be fully stated. If the advice was written, the writing must be produced—if oral, the fact that it was given, and its precise import, must be verified by the affidavits of the counsel who gave it. The propriety of these rules, and the necessity of adhering to them, will be doubted by none who have any knowledge of the difficulties that beset a court in the due administration of its justice, and of the means too frequently employed, by a suppression of truth, to evade its authority. The result of our observations upon that part of this case, which we have now considered, is, that we cannot regard the declarations of the defendants, in their answers to the fourth interrogatory, that they “believed that the injunction did not purport nor mean to restrain them from voting” as they did, as meaning, that they were led to disobey the positive order of the court, by their ignorance and mistake as to its true import, but simply that the injunction did not prohibit the naked act of voting for the resolution in favor of J. Sharp and his associates, if, by so voting, no effect was given to the resolution as a grant. It is true, that the declaration, thus construed, is irrelevant and evasive; but it is better that we should censure it as evasive, than be forced to reject it as untrue. We cannot believe that there is any one of the defendants who have been attached, were the direct question now put to him, whether he believed that the object of the injunction was to prevent them from adopting, as a grant, the resolution they were met to reconsider, who would give any other than an affirmative reply. It is indeed manifest, that unless such was its meaning and object, it had none whatever. It was inoperative and senseless.

Passing then from that, which we deem a necessary conclusion, that the defendants knew what the injunction meant, and meant themselves to disobey it, we are next to consider, whether any reasons have been alleged that should induce the court to

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mitigate, or, so far as our discretion may allow, remit, the penalty, that, otherwise, it would be our duty to impose.

The only reason that has been alleged, that we deem it at all necessary to notice, is, that the defendants fully and sincerely believed that this court had no jurisdiction to issue the injunction, and, consequently, that they were under no obligation to obey it. That, as a court of equity, we possess the jurisdiction, we have already decided; but it has been contended that, conceding our jurisdiction, the opposite belief of the defendants should induce us, so far as we can, to exempt them from the punishment their disobedience might otherwise have merited, since, if intentional, it was conscientious, and the result of a pardonable error. The answers of the Assistant Aldermen contain no averment of their past belief in our want of jurisdiction; but, as they now deny it, we presume that the omission was accidental, and shall give them all the benefit to which the excuse, had it been made, would entitle them.

Our first observation here is, that the averment of the defendants' belief in our want of jurisdiction, is plainly immaterial, unless the meaning is, that this belief was the motive of their conduct. It is manifest that a belief, which had no influence upon their action, can never be permitted to define its character. The fact that we have no jurisdiction would be a complete defence, but the erroneous belief can be no excuse for an act of disobedience with which it was wholly unconnected. To set up the excuse, therefore, is to admit that the disobedience was intentional.

We next observe, that it is not alleged that this belief of the defendants, however sincere and conscientious it may have been, was founded, at all, upon the advice of counsel; still less is it pretended that, upon this ground, they were advised by counsel to "disregard utterly" the order of injunction. For aught that appears, or we are at liberty to intend, it was the advice of Alderman Sturtevant alone that was given and followed. Had the fact been otherwise, it was so material, we must believe, it would have been stated.

Under these circumstances, we are constrained to say, that the alleged belief of the defendants, that the injunction which

they were required to obey was illegal and void, furnishes a very slight, if any, excuse for the course which they followed. Upon so grave an occasion, to act upon their own belief, to use the mildest words, was the extreme of indiscretion and rashness. The public disobedience of the Common Council of this city to the positive mandate of a court of general jurisdiction, hitherto possessing, we trust, the entire confidence of the public, was an act of no trivial importance. The history of our country, we believe, affords no instance of a similar resistance to judicial authority. Viewed in its possible consequences, it was calculated, as an example of disrespect and insubordination, to affect widely the peace and good order of society, and, from the conflict which it threatened, even to impair the confidence of all reflecting men in the stability of our institutions. To venture upon such an act was to assume a deep responsibility—a responsibility that should never have been assumed, unless upon the fullest deliberation, the best advice, and the pressure of a stringent and imperious necessity; yet this responsibility was assumed, and the act performed, without deliberation, without advice, and without necessity. The supposition that there was any necessity for immediate action, is plainly groundless. We have already shown that the resolution, which the defendants, notwithstanding the objections of the Mayor, were determined to adopt, might have been adopted, had its operation as a grant been suspended, without violating the injunction; but, were it otherwise, what reason had they to doubt that a measure, which they believed to be recommended and justified by the strongest reasons of public utility, would be rejected by their successors? And if they were confident in their opinion that the injunction, which they were required to obey, was issued without authority, what reason had they to doubt that, upon application to the court, it would be promptly dissolved?

In the opinion that I gave, in granting the motion for an attachment, I said, that “if the order of injunction was issued without rightful authority, the members of the Common Council, in the just maintenance of their own rights, were bound to disregard it,” and this language has been quoted upon the present argument; but I added—language that was not quoted—that “if this court, upon any ground, possessed the jurisdic-

tion that was denied, it was at their own peril that the members of the Common Council refused to submit to its exercise." It is this language that I now repeat. He who resists the order or process of a court of justice, trusting to his own belief of its want of jurisdiction, acts, in all cases, at his own peril, and when he is proved to be mistaken, is, in all cases, justly punished. And I add, that it is upon this principle alone, that the supremacy of the law, and the just authority of courts of justice, can be maintained.

An unconstitutional law has no force, it creates no duty of obedience; but he who resists a law, because he thinks it unconstitutional, may be involved, by his mistake, in the guilt, and incur the penalty, of treason. Resistance to a law, and disobedience to the process of a court, stand upon the same ground, and every citizen is bound to know that his private conviction, if erroneous, that the law or the process is void, will never be admitted as a justification, and very rarely as an excuse. His only safe course is to obey, knowing that if wronged by his obedience, the law will afford him a full redress.

I have no right, and do not mean to draw in question the sincerity of the belief that the defendants have avowed, and under which they claim to have acted, yet it is not a little singular that this belief was entertained, since there are several cases in which the jurisdiction that is now denied has been exercised, and its exercise, although questioned, submitted to by the Common Council. I refer, without dwelling upon them, to the case of *Lawrence v. The Mayor and Corporation*, 2 Barb. 577; to that of *Brower v. The Corporation*, 3 Barb. p. 254; and to a more recent case, which, I believe, has not yet been reported, that of *Christopher and Tilton v. The Corporation and others*, —the well known Washington Market case. In each of these cases, the objection to the jurisdiction of the court, upon the ground that the injunction prayed for was an illegal interference with the legislative action of the Common Council, was distinctly raised; in each, it was decisively overruled, and in each, the judgment, as I understand, was acquiesced in by the Corporation. In the last case, Judge Roosevelt maintained the jurisdiction of the Supreme Court, as a court of equity, upon the

broad principle that, "corporate property and corporate credit are a trust fund, and corporate powers of taxation trust powers; and a threatened misapplication of the one, or misuse of the other, is a breach of trust, which a court of equity has the power, and in cases of sufficient magnitude and aggravation is bound, to restrain." Such are the words of that learned judge, and most strikingly are they applicable to the actual case which the relators have set forth in their complaint. It is true that the effect of the injunction, in the cases I have cited, was to restrain, not the passage but the execution of an ordinance; but this distinction does not at all affect the question of jurisdiction. To restrain the execution of an ordinance, is to declare its nullity; and a decree annulling an ordinance is just as plainly an interference with the legislative discretion of the Common Council, as an injunction prohibiting its adoption. The power of a court of equity to annul, and its power to restrain, I apprehend, are co-extensive; and hence it will be found, that in every case in which the court has refused to interfere, by an injunction, with the exercise of a discretionary power, the refusal has proceeded upon the ground that the act sought to be restrained would be valid, if performed. In each of these cases, had it been admitted or proved to the satisfaction of the court, that the contemplated act would be an excess of authority, a breach of trust, or a fraud, the injunction would have issued. A court of justice, it must be admitted, cannot restrain the passage of an act of the Legislature, which, when passed, it may declare, as unconstitutional, to be void; but the Common Council is not a legislature, created by the constitution as a co-ordinate branch of the government, and as such, in the discharge of all its duties, wholly exempt from judicial control; and the supposition that such is its character, and such its privileges, is a grievous and dangerous error. Nor are the cases that have been referred to all that have occurred. A case, still more remarkable in its circumstances, has occurred, during the past year, in this court, which, it seems indeed strange, should not have been remembered. I refer to the case of *Pettigrew and Sherman v. The Corporation and others*,—a suit which arose out of the controversy in relation to the Eighth Avenue Railroad. The injunction, in this case, was granted by Chief Justice Oakley,

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and in its tenor resembled that which the Common Council have now refused to obey. It commanded the Corporation to desist and refrain from making and executing any contract or grant, securing to any other persons than the plaintiffs, the right or privilege of constructing the railroad in question. It was construed by the Common Council, as restraining their legislative action upon an ordinance, which the Mayor had returned with his objections to its passage, and upon the ground that such was its construction and force, so far from disputing its validity, and denouncing it as an invasion of their rights and privileges, they made a special application to the court by their counsel, to be released, by an alteration in the words of the injunction, from the duty of obeying it.

It is true, it was held by the court that the application was needless, and that the injunction did not impose the command which the Assistant Aldermen feared to violate, but the ground of our opinion was, that the ordinance, which they wished to reconsider, was not the grant or contract which the injunction forbade to be executed, but contained an express provision, that the permission, which it gave of constructing a railroad, should not take effect until a sufficient agreement between the grantees and the Corporation, to be drawn and prepared by the counsel of the latter, should be signed and executed. The application, however, was still pressed, and would, doubtless, have been granted, had not the counsel for the plaintiffs given a written stipulation that they would not insist upon that construction of the order of the court, which, it was feared, would be adopted and enforced.

It was in August or September last that these proceedings took place.

Remembering these facts, I pass, with much regret at the necessity, which my duty imposes, to the resolutions and preamble which were introduced by Alderman Sturtevant, and adopted by the votes of all the Aldermen, with the exception of Alderman Doherty, who are now before us. These resolutions and preamble, from the terms in which they are expressed, and the imputations which they plainly convey, are regarded by all of us, not merely as an aggravation of the contempt of wilful disobedience to the order of injunction, but as constitut-

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ing, in themselves, a distinct and very serious offence, which we might well have been required to punish as a wilful contempt, even had our own convictions forced us to disclaim our jurisdiction. We cannot give to them the favorable interpretation that we were urged to adopt. We cannot regard them as merely vindicating the rights and dignity of the Common Council, in terms, it is true, not well chosen and somewhat passionate, but implying no disrespect or insult to the judge who granted the injunction, nor conveying the slightest imputation upon his integrity or motives.

The preamble commences with saying that the judge had issued the injunction without "any color of law, or justification," words, which have not merely been demonstrated to be untrue, but, which, if they do not necessarily imply a charge of positive corruption, certainly do, of the grossest ignorance. The preamble proceeds to say that, as the injunction was issued at the close of a session and threw forward the period of showing cause against its continuance beyond the expiration of the session, and this, in regard to a measure that had long been pending, it bore "upon its face a character of indirection," (in other words, trick and dishonesty,) "not less unjustifiable and not less unworthy of the judiciary" than its usurpation of authority and jurisdiction. As the indirection here charged is declared to be "unworthy of the judiciary," it is to the judge who issued the injunction bearing this character, that the dishonesty, which the term implies, is meant to be imputed. We forbear from any further analysis or comments. The plain meaning of the preamble and resolutions is this, that the plaintiffs, knowing that they had no right to maintain their suit, and could not by fair means defeat the measure to which they were opposed, resorted to those, which were indirect and unfair, and that the judge, who, without a color of law, issued the injunction, by continuing it in force beyond the expiration of a session which was about to close, lent himself to their fraudulent design. The publication of resolutions bearing this interpretation, we cannot but regard as a direct and very dangerous interference with the administration and course of justice. It was calculated to prejudice the public mind in relation to the merits of a pending suit, to destroy all confidence in the integrity of a

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judge, whose probity had never been impeached; to intimidate his brethren from giving their sanction to his act, and to degrade in public estimation, the entire tribunal to which he belonged. It remains only to add that neither the author of these resolutions nor any of those, who consented to their passage, with the exception of Alderman Wesley Smith, has chosen, in his answer to the interrogatories, to utter a single word of apology—a solitary expression of regret. I forbear from further comments, and shall close with a few general observations, which the novelty and the importance of the case seem to require, and certainly, justify.

We are proud, and justly proud, of our democratic institutions, and rejoice that our country—a country, in which the legal distinctions of rank are wholly unknown, and the people alone is sovereign—exhibits a spectacle of peace, security, and order, a wide-spread scene of human happiness, such as no other country or age has been privileged to witness. But we shall greatly err, if we attribute the multiplied blessings we enjoy, our unexampled progress, and unexampled prosperity, solely to the nature and force of our peculiar institutions. The experience of other countries, in past ages, and in the present, might well convince us that the institutions in which we glory, would be prolific sources of confusion, discord, and misery, were the disposition and habits of the American people, resulting from a long course of training and discipline, materially changed; nor is there any hazard in saying, that it is to the peculiar, the distinctive character of the American people, that the admirable and successful working of our peculiar institutions, is mainly and eminently due. There are certain great truths that have been long and deeply impressed upon our minds and consciences, and it is the constant influence and moral efficacy of these truths, as controlling our actions in all the relations of life, public and private, that has formed our national character—the character from which our institutions derive their vitality, and to which they owe their success. These vital, governing truths, are, that liberty and order are inseparable, and that the freedom which is not defined and restrained by law, and consciously, willingly, and wholly, subject to its dominion, is sure to degenerate into licence, proceed

to anarchy, and end in despotism. Our country is great, flourishing, and prosperous, because the people has at all times, in the exercise of its own sovereignty, been accustomed, and has rejoiced, to confess the sovereignty of the law, as limiting and controlling its own. It is so, because we long have been, still are, and, I trust, will ever remain, a law-reverencing, law-obeying, and law-abiding people. But it is manifest that this deep reverence for the law, this prompt and cheerful submission to its dictates, this fixed resolve to abide its determinations, by which, as a nation, we have, hitherto, been distinguished, are inseparably connected with the confidence which is reposed in those by whom the law is administered, and can, in reality, subsist no longer than while that confidence is felt and maintained. Hence, none are more dangerous enemies to our country and its institutions, by whatever pretext they may seek to veil their conduct, than those who seek to destroy or impair this necessary confidence, by rash denunciation, groundless imputations, open disrespect, and public disobedience. The inevitable tendency of such proceedings is to weaken and unsettle our government, in its very foundations, and in every branch of its administration. They strike at the root of our national prosperity, and poison and corrupt the fountain from which all our blessings flow—the supremacy of the law, manifested and sustained by the ready submission of all to its dictates and authority.

The judge then proceeded to pronounce the sentence of the court.

I have no doubt that the sentence that we are about to pronounce will be thought by many far more lenient than the nature of the case, and the observations that I have made would justify. But there are many circumstances which have induced us to think, that in the existing state of public opinion, it is far better to err upon the side of moderation than upon that of severity. The most aggravated case is that of Alderman Sturtevant; he was the author of these resolutions. His framing and preparing them was a deliberate act. Their adoption by his brethren might have been the result of haste and passion. His case, therefore, must be distinguished from the others. The sentence as to Alderman Sturtevant is, that he shall be impri-

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soned in the city prison for the term of fifteen days; and he shall pay to the city treasury a fine of \$250, and to the relators, for their costs and expenses, \$102 07.*

In relation to each of the Aldermen who voted for the resolution of Alderman Sturtevant—with the exception of Alderman Wesley Smith, who, in suitable terms, has expressed his regret, and has made what we deem a sufficient apology—we impose upon each of them a fine of \$250, in addition to the sum of \$101 51 for the costs and expenses of the relators, to be paid to them. Alderman Doherty voted against the resolutions, and Alderman Smith has very properly submitted himself to the judgment of the court by a concession of his error. Upon each of them, therefore, as well as upon each of the assistant aldermen who laid the resolutions upon the table, we impose a fine of \$100, to be paid to the treasury of the city, in addition to the sum of \$101 51 for the costs and expenses of the relators. In each of these cases a warrant will be issued, committing the parties to prison, until the fine that has been imposed, is paid.

BOSWORTH, J.—This proceeding has reached that stage, at which it becomes the duty of the court to decide whether the defendant is guilty of the misconduct alleged against him, and if it determines that he is, to also decide what the punishment shall be.

Although this is in fact a proceeding at Special Term, yet having, in connexion with my brother Emmet, sat with the judge before whom the proceeding is pending, not merely to assist him by acting advisorily, but upon the understanding that the counsel of neither party expects the questions that have been argued here to be re-argued on any appeal that may be taken to the General Term, but that the final determination to be made at the Special Term will be passed upon at the General Term, without further argument; I deem it due to the position in which I am placed, with respect to this proceeding

* The sum total of the costs and expenses of the relators had been previously ascertained by a reference, and in the imposition of the fines an equal proportion was charged on each defendant.

and to the parties who may be affected by the decision, to state the conclusions at which I have arrived, and the reasons on which they are founded.

The complaint, which was duly verified, prayed for an injunction, restraining; and on such complaint an order was made by a judge of this court, "commanding and strictly enjoining the defendants (therein), the Mayor, Aldermen, and Commonalty of the city of New York, their counsellors, attorneys, solicitors, and agents, and all others acting in aid or assistance of them, and each and every of them," to "absolutely desist and refrain from granting to, or in any manner authorizing Jacob Sharpe and others" (the persons named in the resolution, a copy of which was annexed to the complaint and marked B), "or their associates, or any other person or persons, whomsoever, the right, liberty, or privilege, of laying a double or any track for a railway in the street known as Broadway, in said city of New York, from the South Ferry to Fifty-seventh street, or any railway whatsoever, in Broadway; and from breaking or removing the pavement in said street, or in any other manner obstructing said street, preparatory to, or for the purpose of laying or establishing any railway therein, until the further order of this court in the premises."

The injunction order was granted on the 27th of December, 1852, in an action in this court, in which the relators were plaintiffs, and recited, that it appeared (to the judge who granted it), from the complaint in that action duly verified, that the plaintiffs were entitled to the relief demanded in the complaint, and that such relief consisted in restraining the defendants as hereinbefore stated.

Before the alleged disobedience of the injunction, a copy of the summons and complaint, and the injunction itself, were duly served on the mayor of the city. The injunction was also served on each member of the Common Council, the defendant being one, by exhibiting to each member personally, the injunction itself, and delivering to and leaving with him a copy of it, and such service was made prior to the alleged disobedience.

On the 29th of December, after such service had been made, the Board of Aldermen, by the votes of a majority of its mem-

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bers (the defendant being one who so voted), passed a resolution, granting to Jacob Sharpe and others the authority and consent of the Common Council to lay a double track for a railway in Broadway, and transmitted the same to the Board of Assistant Aldermen for their concurrence. The latter body passed it on the 30th of December, and on the same day the grantees formally accepted the grant. This resolution had been previously vetoed by the mayor, and was adopted by both Boards of the Common Council, notwithstanding the objections of the mayor, and in disregard of the injunction.

A copy of this resolution, in the form in which it was finally adopted, was annexed to the complaint, which alleged that the members of the Common Council avowed a purpose to pass it, and were continuing their session by adjournments from day to day for the purpose of passing it, and that the persons named as grantees in the resolution avowed a purpose to accept the grant as soon as made, and to immediately proceed, under the authority conferred by it, to tear up the pavement and construct a railway in Broadway.

Immediately after the passage of this resolution by the Board of Aldermen, the defendant introduced before that body a certain preamble and resolutions (a copy of which is annexed to the interrogatories filed on this proceeding and marked C), and on his motion, it was adopted by the votes of a majority of that body, including his own. The defendant, in his answer to the interrogatory put to him, states that, at the time of voting for the resolution creating the grant, he did "believe that the said injunction did not purport, and did not mean to restrain him from voting in favor of the said resolution."

The preamble to the resolutions introduced by him immediately thereafter, and adopted on his motion, recites that the judge who made the order had granted it "without color of law or justification;" and had assumed the prerogative of directing and controlling the municipal legislation of the city, by prohibiting the defendants therein "from performing a legislative act;" that said injunction "bears on its face a character of indirection, not less unjustifiable, and not less unworthy of the judiciary, than the usurpation of authority and jurisdiction which is contained in such an attempted injunction itself;"

“that if such a precedent of unwarranted and unwarrantable interference with the rightful functions, powers, and duties of a legislative body, attempted by a judge, be submitted to or tolerated without a just rebuke,” the consequences subsequently recited might follow; and that the reasons alleged for the injunction are equally “untenable in law and unfounded in facts.”

The first of the resolutions annexed to the preamble declared that “it is the duty of the Common Council, on this unprecedented occasion, to protect its own dignity and the rights of the people of the city of New York, and its constituency, by utterly disregarding the said injunction on its legislative action, and declaring its sense of the same.”

The second of such resolutions declared “that the Common Council have an equal authority and right to suspect and impute improper motives to any intended judicial decision of any judge, and consequently to attempt to arrest his action on the bench, as such judge has in regard to the legislative action of the Common Council.”

No regret is now expressed, either for having disregarded the injunction, or for having introduced or voted for the resolutions in relation to it and the action of the judge who granted it; but it is expressly stated in answer to the fifth interrogatory, that he then believed and still believes “that the court had no jurisdiction to grant the injunction, and believing that it is the right of every citizen to question and resist the exercise of illegal power,” he voted for the resolutions under the influence of the various considerations stated in his answer to that interrogatory.

It seems to be too clear to admit of doubt, that he voted for the resolution creating the grant, with the intent to have the resolution become absolute and effectual as a grant, so far as the Common Council were competent, by any action on their part, to make it absolute and effectual, and with the expectation that the grantees would accept it as provided by the terms of the resolution. They did so accept it.

This act of the defendant was a clear and palpable violation of the injunction. (*Ross v. Cluseman*, 3 Sand. S. C. R. 676.)

It seems impossible to deny, after reading the preamble and

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resolutions subsequently adopted, that the injunction was understood at the time as prohibiting by its terms, the passage of the resolution creating the grant with the intent to have it accepted and become effectual. That was the very resolution, which the complaint alleged the Common Council avowed a purpose to pass, and the attempt to restrain its passage by injunction was the alleged assumption of power which was denounced, and as to which, they declared it was due to their own dignity, and the people, that they should protect them, "by utterly disregarding the said injunction upon its legislative action."

There would seem to be no grounds presented on which the court is at liberty to draw the more agreeable and charitable conclusion, that the disobedience was unintentional, or was an act done in good faith, and believed not to come within the letter or spirit of the prohibition.

If it be true, as the defendant avers in his answer to the fourth interrogatory, that, at the time of voting for the resolution creating the grant, he verily believed the injunction "did not purport, and did not mean to restrain him from voting in favor of the said resolution;" then the censorious resolutions and preamble introduced by him, and adopted on his motion, have not even the poor apology of momentary indignation, excited by a supposed usurpation of power.

If it be true that he believed it did not purport and did not mean to restrain him from giving the vote which he gave, and with the intent with which it was given, then it could not have been understood by him as interfering with any legislative or other act done by him as a member of the Common Council, with reference to the subject matter of this action.

If that was his sincere belief, then there was nothing to suggest the idea, "that it was the duty of the Common Council on that unprecedented occasion, to protect its own dignity, and the rights of the people of the city of New York, by utterly disregarding the said injunction on its legislative action, and declaring its sense of the same."

If such was his sincere belief, then in his judgment no legislative action contemplated or taken by him had been enjoined. No vote which he intended to give, or subsequently gave, had

been prohibited. There had been no attempt to control the legislative action of the Common Council, but on the contrary each member was left entirely free to vote as he pleased, and whenever it might suit his pleasure. But the unmistakable terms of the preamble and resolutions annexed to it, coerce my mind to the unpleasant conviction, that he did understand the injunction to prohibit him from voting for the resolution creating the grant, and that the injunction was knowingly and designedly disobeyed.

Such an act is "wilful disobedience," is a criminal contempt, punishable as such, and indictable at common law and by statute.

Such an act was calculated to defeat, impair, impede, and prejudice the remedies of the relators. It has actually prejudiced, if not impaired and defeated their rights.

If the facts stated in the complaint are true, if the grant was about to be made under circumstances manifesting a gross abuse of power, and which would make it a fraud upon the rights of every citizen; if the railway, when built and used, would be a public nuisance productive of special injury to the relators, it was their right that the grant should not be made.

If the injunction had not been violated, the whole question might have been determined in that action.

That cannot now be done.. At least it is not clear that it can be. The grantees have acquired rights, if the action of the Common Council has any legal validity; and they are not parties to this action. No judgment can be pronounced which can operate directly on them.

If the decisions of the Supreme Court of the United States are a correct exposition of existing law, and as such controlling as authority, then I admit an inability to understand why the resolutions, giving authority to Jacob Sharpe and others, to construct a railway, and their acceptance of it, are not as much a contract as an act of a state legislature, conferring precisely the same powers and rights.

I had supposed it to be well settled that when the Legislature of a state, whose powers are limited only by the prohibitions contained in the constitution of the state and that of the United

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States, passes an act, being in its nature a contract, and absolute rights have vested under it, that a repeal of the law cannot divest those rights, nor annihilate or impair the title so acquired. That a legislative grant is a contract within the meaning of that provision of the United States constitution, which prohibits a state legislature from passing any law impairing the obligation of contracts; and that the prohibition extends as well to executory as to executed contracts. (1 Kent. Com. 413, 422.)

If the making of this grant was a legislative act, within the proper meaning of those terms, if the Common Council had full power to make it, if this power is beyond judicial control in every conceivable case, no matter how corruptly, fraudulently, or ruinously to the rights of individuals and the public, it may be about to be exercised, it will certainly be an anomaly, if, after the grant has been made and accepted, and the road built in every respect in conformity with the terms of such a grant as is contained in the resolution in question, the Common Council may rescind the grant, and divest the rights acquired under it, precisely as they may order a street to be widened or extended, or may repeal any mere police ordinance or regulation.

If this be so, then it follows that although a repealing act passed in such a case by the state legislature would be nugatory and of no effect, yet such a legislature has power to authorize another body to exercise legislative powers which it cannot exercise itself, and to give to the legislative action of the body it creates the force and obligation of law; while the same action, if performed by itself, under the most solemn forms of legislation, would be utterly nugatory and void.

The form of the proceeding by which the Common Council saw fit to confer full and absolute authority on Jacob Sharpe and others, to construct and operate by themselves and their successors, a railway in Broadway, determined nothing as to the nature of the transaction between that body and Sharpe and his associates. If they chose to grant the authority by a resolution resembling in form a legislative act, then the nature of the transaction is to be determined by the character of its provisions. If they confer power on certain persons to act

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under it, in such a manner that they may acquire rights and property solely by force of the resolution itself, and from having conformed to its requirements, the transaction is a contract. Such is the nature of the transaction in question, and the consideration to be paid for the grant is specified in the resolution.

Instead of being able to have it determined in this suit, whether it would not be a clear abuse of power on the part of the Common Council to make such a contract, and whether the execution of it would not produce a special injury to the plaintiffs beyond that to which every other citizen in common with them would be subjected, and to procure a judgment which would prevent the making of the grant, if the decision should be favorable to them, it now becomes necessary either to amend the proceedings and make the grantees parties, in order to obtain a judgment that can operate directly upon them, or to institute a new action for that purpose.

There can be no doubt then, that the act of disobedience was calculated to defeat, impair, impede, and prejudice the remedies of the relators.

The court were reminded on the argument, of the position taken on the hearing of the order to show cause, that the Code requires a copy of the affidavit on which such an order is made, to be served with it, and were referred to a decision of this court, that to bring a party into contempt for disobedience of an injunction order, it must have been served upon him by exhibiting the order itself, at the time a copy of it is delivered. (*Coddington v. Webb*, 4 Sand. S. C. 639.)

The rule adopted in the case cited, if adhered to as a rule to be applied to all cases, would be productive of irreparable injury to parties, as will be manifest from looking into the facts of some of the reported cases, which hold that a party may be punished as for a contempt, when he has knowingly and designedly done acts which he knew, at the time, the court had, by an order, prohibited him from doing, although at the time no order had been served, or in fact entered—but had only been directed to be entered. (*Hull v. Thomas Head et al.*, 3 Edws. Ch. R. 236; *The People ex rel. Morrison v. Brower*, 4 Paige, 405; *Stafford v. Brown and Others*, *Id.* 360; 1 Craig & Phillips,

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98; *McNeil v. Garratt*; *Com. Digest, Chancery* (D. 8); *Injunction*; *Notes a, b, c, d*; *St. John's College, Oxford v. Carter and Others*, 4 Myl. & C. 498.)

Where a party is directed by an order of court to do something, as to pay money, deposit papers, &c., and his whole obligation to act at all depends not only on the existence of the order, but also upon its being served in a particular manner, it is a proper rule of practice not to hold him guilty of a disobedience of the order for not having done the thing required until he has been shown the order and furnished with a copy of it. There are reported decisions showing that in such cases the Court of Chancery has refused to punish as for a contempt, on the ground that the order itself was not shown to the party at the time of serving the copy.

If my brethren did not consider that the Aldermen and Assistant Aldermen were, as such, actual parties to the suit, and that there was a complete service on them by the service made on the chief officer of the Corporation, and that such service having been made, it is enough to render the defendants liable to be proceeded against as for a contempt, that they did what the injunction prohibited, with actual knowledge of its existence and contents, I cannot but think they would deem it important to allow the point decided in *Coddington v. Webb* to be reconsidered, and so restrict its application as to prevent great and manifest injustice from being done under its operation.

If the defendants cannot be considered as being actually parties to the suit in which the order was made, then the question would arise whether it is operative against them as individuals, and whether they can be proceeded against for having deliberately done, as the agents or officers by whom alone the party defendant could do the prohibited act, what they knew their principal had been forbidden to do, for the purpose of performing it in behalf of such a principal.

It is enough to say, that when an agent, officer, or servant, claims no right to act or interfere at all, except in that capacity, and in that capacity he does acts which he knows it is unlawful for his principal to do, and which it is impossible in the nature of things for the principal to do except through his action, he has no reason to complain of being subjected to the

same consequences as would be visited on the principal himself for disobedience.

The cases cited in the opinion given on the order to show cause—show that such a practice had been pursued.

The 3d sub. of § 1, of 2 R. S. 534, expressly provides not only, “that parties to suits,” but also, “attorneys, counsellors, solicitors, and all other persons,” may be punished as for a contempt for the non-payment of money ordered by the court to be paid, in certain cases, but also “for any other disobedience to any lawful *order, decree, or process* of such court.”

There cannot well be a decree against a person not a party to a suit, which can operate upon him at all, except to prohibit him from doing as the solicitor, attorney, or agent of a party, some act which it enjoins the party from doing.

This section having authorized the punishment of persons other than parties to suits, for any and every disobedience to the lawful order or decree of the court, the language is broad enough to reach, and seems unmeaning, unless it is construed to reach the very case of disobedience of an order, by one person, as agent of another, when he deliberately does what he knows at the time the court has forbidden his principal and agents to do.

In that way he can disobey an order or decree made in a suit to which he is not a party. If he chooses to do that, knowing that every person is prohibited from doing it as the agent of the party, and disobeying its acts as such agent, there is no reason why he should not be punished for such disobedience, and for such “unlawful interference with the proceedings in the action.” (Id. sub. 4.)

It is unnecessary to examine further any of the objections taken to the regularity of the proceedings; the nature and character of the disobedience are, at present, the matters of paramount importance.

A somewhat grave and delicate point is presented at the outset to the consideration of the court. It arises out of the adoption of the preamble and resolutions annexed to it, which were adopted by the Board of Aldermen, immediately after the act violating the injunction.

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They undoubtedly impute to the judge who made the order the high offence of having assumed, without color of law or justification, to interfere with the legislative action of a body having legislative powers; that his order bore on its face an indirection not less unworthy of the judiciary than the alleged usurpation of authority, and seems to distinctly charge that his acts were such an unwarrantable interference of a judge, as should not be submitted to or tolerated, without a just rebuke.

The publication of such an attack upon the action of a judicial officer pending a suit, and upon his conduct with reference to any order or decision made by him, in a suit pending and undetermined at the time such publication is made, is a contempt at common law, and punishable as such. The cases cited below, would seem to leave the question free from doubt. (J. B. Wallace's R. 77, *Hollingsworth v. Duane*; *Oswald's case*, 1 Dall. 319; *Matthews v. Smith*, 3 Hare, 331; *Little v. Thomson*, 2 Beavan, 129; 2 Atkyn's, 469; 13 Ves. 239; 1 Phillips, 454 and 605; 2 Mylne & Craig, 360; *Crawford's case*, 13 Ad. & Ellis, (N. S.) 613.)

The inevitable effect of such a publication upon all who may give the least credit to its statements, and to the imputations it contains, is to prejudice their minds against the justice of the plaintiffs' claims, and the truthfulness of the allegations of fact on which they base their right to relief, and to favor the idea that the law is not uprightly administered between the parties to the action, and thus to interrupt the free course of justice, and dishonor its administration. Such misconduct tends to prejudice both the rights and remedies of a party. The statute expressly provides that misconduct of that tendency, in all cases where attachments and proceedings as for contempts, have been usually adopted and practised in courts of record, to enforce the civil remedies of any party to a suit in such court, or to protect the rights of any such party, may be punished in a proceeding like this. (2 R. S. 534, § 1, sub. 8.)

Besides, it is an "unlawful interference with the proceedings in an action," and this, in the same section, is made a distinct ground for punishing a party as for a contempt. (Id. § 1, sub. 4.)

It is not only an unlawful interference with the proceedings in the cause, but it is one whose consequences may be of the most grave and serious character.

In a country whose peace and quiet, and under a form of government whose very existence depends upon a cheerful obedience to law, and upon an absolute acquiescence in such protection to the rights of persons and property, and in such redress by way of the prevention and punishment of wrongs as may result from such obedience, and from an impartial but firm administration of justice between man and man, it is of the highest importance to the public and to suitors, that those who administer the law should not only be pure, but unsuspected.

It is not the personal injury that may possibly result to the members of a court, from falsely speaking, and writing contemptuously of it, or of the judges, in their judicial capacity, who may compose it, of which the wrong done, wholly or in any considerable degree, consists.

But the most grave and serious part of the wrong consists of the injury done to the community at large, by the tendency of such proceedings to dishonor the administration of justice, and impair the confidence of the public in the integrity of those tribunals, to which they turn as a last resort, to obtain that strict and impartial justice to which the laws of the country entitle them.

When our citizens are coerced to feel that such a hope can be no longer confidently cherished, that they cannot be certain of obtaining just redress in the courts of justice, that they must submit to such justice as may be awarded by a court whose official action in the case has been characterized by such an assumption and illegal exercise of power, that it ought not to pass unrebuked, the courts will have become so contemptible that nothing which might be published of them ought to be punished as a criminal contempt.

Yet no pretence has been made that the injunction was not granted from the purest convictions of duty, and on the honest judgment that the case made by the complaint entitled the plaintiffs to it. The only apology, if it should be so called, that has been made is, that those who disobeyed it had a different opinion of the law from that entertained by the judge

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who granted it, and that they chose to test the question of the jurisdiction of the court by disobedience, rather than have it determined by the tribunals created by the people, to settle such controversies in the mode prescribed by law.

No regret is expressed at having passed the preamble and resolutions. On the contrary, the answers to the interrogatories conclude with challenging the authority of the judge to make the order that has been disobeyed, and also the jurisdiction of the court to entertain the proceedings in which it now becomes its duty to make a final decision.

These facts render the duty of the court in pronouncing final judgment still more delicate and embarrassing.

The duty which they are required to perform is one which they owe to the public, as well as to the parties to the proceeding. It is one in which no consideration personal to the members of the court exists or can arise, except such as are attendant upon the decision of every matter submitted to their judgment, and incident to the obligation and the wish to make a decision which will render equal and exact justice to the defendant, the relators, and the public.

This duty, however unpleasant its performance, is not one from which they can escape, or which they can avoid. It is one which they are coerced to discharge by the obligations springing from the office they hold, the duties of which they have sworn to faithfully and impartially discharge, according to the best of their judgment and ability.

In arriving at the conclusion what order should be made, the statute has, as to one part of it, left us no discretion: That is imperative that a fine should be imposed at all events, sufficient to satisfy the costs and expenses of the proceedings.

The more serious question remains, whether any fine in addition to this should be imposed, and if so, to what amount, and whether any imprisonment should be ordered, except to coerce the payment of the fine.

In this case the disobedience was deliberate and intentional, and was immediately followed by the introduction and passage of the preamble and resolutions, to the character and tendency of which sufficient reference has been made. If the defendant had contented himself with merely disobeying the injunction,

and such disobedience had resulted from a belief that the judge granting it had no authority to make it, and that the court had no jurisdiction, on any conceivable state of facts, of an action to restrain the doing of that which it prohibited—however pernicious the tendency of the example, the case would have been altogether different from that on which we are now obliged to decide.

The defendant, on his oath, states in answer to the interrogatories, that he not only then believed, but still believes, that the court has no jurisdiction of the action.

That belief may be ultimately held to be in accordance with the law of the land, but the judgment of the court being to the contrary, it can find in it but very little mitigation of the offence, as that is not the mode in which a law-abiding citizen should test in such a case, the accuracy of his opinion. I incline to the opinion that the affidavits read on the part of the defendant on the order to show cause, should be taken into consideration. They contain, it is true, nothing in relation to the fact whether he did or did not disobey the order, and therefore have no bearing upon the question whether he disobeyed it, or whether the disobedience was wilful.

But they contain statements of facts which, uncontroverted, might induce the defendants to believe that the offers, apparently so much more advantageous to the city, were not made in good faith, but were made by enemies of the measure, and under preconcerted arrangements with others equally hostile to it, to take such legal proceedings as would inhibit them from constructing or attempting to construct the road, even if their application had been preferred, and the authority had been given to them.

If such was the state of existing facts, or if he honestly believed such to be the facts, then a case was presented for the exercise of his discretion. And with the mere exercise of his discretion, with reference to such a state of facts, no court, I presume, would interfere.

If such a state of facts shall be shown to have existed, the question of the authority of the Common Council to make such a grant would then be reduced to one of mere naked power, to affect the rights of the public and of individuals, as it might

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be made to appear that such a road and its use would impair them.

That is a question on which this court has not as yet passed, and does not enter into the considerations upon which it concluded that, on such a case as was made by the complaint, it had jurisdiction to make the order.

The facts stated in the opposing affidavits do not touch the question of jurisdiction, but bear upon the merits of the controversy, and controvert the truth of some of the facts constituting the equity of the plaintiff's case.

Neither do they tend to show that the order was improvidently made, if the court is right in its views of its jurisdictional powers, for the judge who made the order was compelled, as he is in the case of every application, to determine upon the propriety of granting it, solely on the facts contained in the affidavits on which the application was based.

These affidavits were not before him, nor could he have justified himself in refusing the order, by assuming, without anything on which to base the assumption, that the facts stated in the complaint, and sworn to be true, were false in any material particular.

Still the court should not overlook the consideration, that on these affidavits third persons swear to facts which, if uncontradicted, presented a case for the exercise by the defendant of a discretion, if it should be ultimately determined, that authority existed to make such a grant, in a case free from a fraudulent use, or gross abuse of that authority, and provided also that it shall appear that the road would not be a public nuisance.

The court, it is true, will not try the merits of the action in this proceeding, nor permit a party lawfully enjoined to speculate upon what may be the decision of the court, upon the equity of the complaint upon which the injunction has been allowed, nor to test the improvidence of granting it, by wilful disobedience.

But I think it may properly look into opposing affidavits, so far as to see if there is color for the position; that if the facts existing had all been fully and fairly presented in the affidavits on which the injunction was sought, the court might have hesitated to grant it, and if that is clearly apparent, to give

some weight to it in determining what punishment should be awarded. But there is nothing in the affidavits which essentially mitigates the misconduct of the defendant.

The example set by him is not sought to be excused, but, on the contrary, to be justified, on the ground of the utter want of jurisdiction of the court to entertain the action.

Such an example is exceedingly pernicious. So far as it produces any influence, it tends to predispose the community to array their own judgment against that of the tribunals constituted to declare and enforce the law, and to wilfully disobey orders and judgments, whenever the parties against whom they are made, shall come to the conclusion that the court has mistaken the law.

It is obvious that such a practice, if tolerated, would soon result in an open defiance of the administration of justice, through the constituted tribunals, and the end would be inevitable and hopeless anarchy.

No human judgment is so perfect as to be exempt from a liability to err, nor is the proper interpretation and application of the law in all cases so easy, that different minds, aided by equal industry, experience, and integrity of purpose, will always come to the same conclusion.

State legislatures sometimes, upon full consideration, enact laws which the courts, in the honest and independent exercise of their judgments, believe and adjudge to be repugnant to the constitution and void. Such a law, any person, so far as strict legal right is concerned, may lawfully resist.

But any one who should attempt to question its validity by forcible resistance, rather than by an appeal to the courts, whose province it is to determine that question, and whose powers are sufficient to secure him full indemnity and redress for any injury that may temporarily result from that obedience which becomes the orderly citizen, would inflict a serious wound upon the institutions of the country, violate the principles on which they are founded, and furnish an example which, if generally followed, would lamentably demonstrate that in the community of which he was a member, liberty regulated by law could not long continue.

Courts too, may err, as courts have erred, in relation to their
D.—I.

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jurisdiction. When such an error of judgment may unfortunately occur, however much it should be regretted, the consequences are trivial in comparison with those which may result from a wilful disobedience to its orders, and an unexcused and inexcusable effort to dishonor the administration of justice, by a rude attempt to scandalize the courts of the country, or the judicial action of its members.

The example is still more pernicious in its tendency when set by a man invested with authority, who, by virtue of his office, is a conservator of the public peace, and a member of the courts constituted to try persons indicted for the commission of crimes. A wilful disobedience of any lawful order of a court was a criminal offence, at common law, and is declared to be such by the statutes of this state, is punishable by imprisonment, in a county jail, not exceeding one year, or by fine not exceeding \$250, or by both such fine and imprisonment. (2 R. S. 697, § 40: id. 693, § 14; id. 278, § 10, sub. 3; id. 538, § 26.)

Giving the defendant the fullest benefit of every extenuating consideration that has been presented, the most favorable judgment that the court can render, consistent with a proper discharge of its duty to the public, is one which does not order imprisonment merely as a punishment, for the full term provided by the statute.

Every one must know that the members of the court, as a matter of necessity, cannot be ignorant of other and vague charges which are made against members of the Common Council. This fact is alluded to only for the purpose of saying that the judges of this court would be unworthy of the stations they occupy, if they allowed any such extraneous matters to exercise the slightest influence upon their deliberations, or in the formation of their judgment.

The only matter with which they have anything to do is, to determine whether the defendant has disobeyed an order lawfully made by a judge of this court, what is the true nature and character of that disobedience, what effect it has had or is calculated to have upon the rights or remedies of the relators and upon the interests of the community, and to give such judgment as shall be just to them, to the defendant, and to the public.

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That judgment should be formed and pronounced under the influence of precisely such considerations as would guide and control it, if the particular misconduct here complained of was the only misconduct ever imputed to the defendant for any act of his life, public or private. For this, and this alone, he is now on trial.

In the exercise of my best judgment, I think he should be imprisoned in the county jail for the period of fifteen days, that he should also be fined to the amount of \$250, to be paid, when collected, to the Chamberlain of the city, for the benefit of its citizens; and in the further sum of one hundred and two dollars and twenty cents, to satisfy the costs and expenses of these proceedings, to be paid to the relators; and ordered to be committed to prison until such fine and costs and expenses are paid.

In giving judgment in such a matter, if there should chance to be any error, the error should be one arising exclusively from the lenity of the sentence, and on no account from its severity.

I think a discrimination should be made between the case of this defendant and that of any other of the aldermen who merely voted for the preamble and resolutions: they might have so voted without that consideration and understanding of their import, and the manifest impropriety of passing them, which is naturally to be imputed to one who prepared and offered them for adoption.

If the slightest regret for the passage of them had been avowed in their answers to the interrogatories, on which the court could justify itself for overlooking that act, I should be disposed to go as far in that direction as would be consistent with a proper discharge of the duty which the court owes to the public.

But no regret is expressed for that act, or for having violated the injunction: even the legality of the order is still questioned, and the jurisdiction of the court protested against: all but two of them answer in the same form, and thus present themselves to the court as being alike insensible of the true character and tendency of the misconduct charged against them,

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and alike indifferent to the consequences to themselves or the public.

If the sober reflections, and more matured judgment resulting from a subsequent consideration of the matter, have induced either of them to regret the act, or to regard their example as one dangerous in its tendency, he has not allowed the court to know it. However much the court may regret this result, it is one over which they have no control: they can look only to the case, as the defendants have preferred to make it, and must pass upon it, as it is submitted to them for final judgment.

In so deciding upon it, they are not at liberty to overlook the position which the defendants voluntarily choose to take with reference to the act of disobedience, when presenting their case, as they desired it to be regarded by the court in forming its final sentence. (*Palmer v. Kelly et al.*, 4 Sand. Ch. R. 575; Mr. Lechmere Charlton's case, 2 Mylne & Cr. 359-360.

It is my opinion that a fine should be imposed on each of the other aldermen, except Aldermen Smith and Doherty, of \$250, to be paid to the Chamberlain of the city, and the further sum of \$101 51, to satisfy the relators' costs and expenses of the proceeding.

Alderman Smith has made an apology which, while it does no discredit to him as a man or a public officer, furnishes grounds to the court for making a discrimination in his favor, which it would have been more agreeable to it to have been able to extend to all the defendants, if they had but thought proper to have made such answers to the interrogatories as would have rendered such action practicable.

Alderman Doherty voted against the preamble and resolutions. By this act he repels the idea of intending by his disobedience any other contempt of the lawful authority of the court, than such as arises from a deliberate disregard of the order, induced, perhaps, by the conviction that he was the best judge of what the law was, and that he preferred disobedience, with its consequences to the public and himself, rather than submission to the order, and an application to the court to modify or vacate it.

Each of these defendants should be fined \$100, to be paid to

the City Chamberlain, and the further sum of \$101 51, to be paid to the relators to satisfy their costs and expenses of the proceedings against him.

The case of the Assistant Aldermen is somewhat different from that of the two aldermen last named, or that of either of the others. They took no action upon the preamble and resolutions.

Before voting for the resolutions creating the grant, they obtained, as their answers state, the advice of counsel, and were advised that "the injunction did not purport, and did not mean to restrain them from voting in favor of the said resolution."

This affidavit is not one which can justify the court in wholly omitting to impose a fine. It is not one which would prevent the taking of an inquest, or which would entitle a party to have a default opened, for the purpose of having a trial on the merits.

The name of the counsel is not stated, and the court is without any means of conjecturing whether his advice would be entitled to little or much consideration. On what statement of facts the advice was given, the answers do not disclose.

The answers do not state that counsel advised them that, voting for the resolutions containing the grant with the intent of enabling the grantees to accept it, and with the expectation that they would accept it, pending the injunction, would not be a palpable violation of it. We cannot imagine that any respectable counsel would have given any such advice.

That it was voted for with that intent and expectation is not denied. It is too clear in our judgment to admit of a doubt that they did vote for it with that intent and expectation.

In that expectation they were not disappointed. At some hour of the night on which the resolution was fully adopted by their votes, and made absolute and effectual, so far as that result depended on the action of the Common Council, or the will of its members, it was accepted by the grantees in the manner prescribed, and thus the grant became complete.

No regret is expressed for violating the injunction, nor is the slightest intimation made that, under similar circumstances, their conduct would be different.

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Their answers conclude with challenging the jurisdiction of the court to control, or to call them to an account for their vote.

The court has not attempted to coerce their vote against their convictions of duty, nor made any order which would have prevented them from voting in favor of the resolution.

They were prohibited from granting to Sharp and others the privilege, or in any manner authorizing them to lay a track for a railway in Broadway.

They could have voted for the resolution, if they had added to it a provision that no acceptance of it should be made or filed, or if made, that it should be void and of no effect, if made before the injunction was vacated, or so modified as to allow of such acceptance. If the adopted resolution had been accompanied with such a provision, no court would have entertained a proceeding, to punish them on the ground that they had disobeyed the injunction.

If there had been a disposition to obey the order served upon them, it would seem that obedience might have been rendered, without jeopardizing any right or interest, public or private.

On and after the first of January, 1853, the Common Council would be as competent to pass the resolution against the veto of the new Mayor, as against that of his predecessor.

The same Aldermen continued in office through 1853; the changes made in the Board of Assistant Aldermen, by the previous November election, withdrew from it but four or five of its old members.

The adoption of a resolution, for which so many of each board voted, against the objections of the Mayor, and, notwithstanding the injunction, would seem to be certain, if submitted anew to the Common Council of 1853, if the strong favor which it received resulted from a conviction of its paramount importance to the public interests.

There was no necessity, legal or moral, coercing any Alderman or Assistant to vote in favor of it, pending the injunction; the majority by whose votes it was adopted, had the power to postpone the consideration to a future day, or to refuse to consider it then.

The objections and disapproval of the chief magistrate of the

city, admonished them that, in his judgment, it ought not to be passed. The order of a court, of competent authority, prohibited them, absolutely, from granting the privilege, or conferring the authority, which they did grant and confer by the adoption of the resolution.

It was an order of the court which had on other occasions prohibited them from doing acts which, if performed at all, would be performed by their voting as Aldermen or Assistants in favor of pending resolutions. On other occasions the order had been obeyed.

Under such circumstances, it is the duty of the court, after giving the greatest consideration to everything urged in extenuation, not to overlook the act, or encourage others to imitate the example, in consequence of granting to it entire impunity in a case so marked and prominent as this.

In my judgment, a fine of \$100 should be imposed on each of the Assistant Aldermen, to be paid to the City Chamberlain; and also of \$101 51, to be paid to the relators, to satisfy their costs and expenses of the proceedings.

In the case of each of the Aldermen and Assistants, the order to be entered, should direct that he be committed to prison until he pays the fine imposed upon him, and also the costs and expenses which he is ordered to pay.

EMMER, J. Differed with the court as to the amount of punishment; and said:

I regret to say, that while I concur fully with the general views of this case, as presented by the able opinion of Judge Duer, and agree to all the conclusions of law stated by him, I am not so fortunate as to assent entirely to the judgment which he has pronounced. I will endeavor, therefore, briefly to state in what respect I dissent from that judgment, and my reasons for so dissenting. In regard to the amount of fine imposed upon the delinquent parties respectively, both Aldermen and Assistant Aldermen, I have no objection to offer. Nor do I find fault with the judgment of the court as to the particular case of Alderman Sturtevant. But if it be right and proper, as I think it is, that Alderman Sturtevant should be punished by imprisonment, as the author and promoter of the resolutions

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and preamble which contemned the authority and impugned the motives of a judge of this court, I am at a loss to perceive why the other members of the Board of Aldermen who approved of, adopted, and voted for those resolutions and preamble, should be wholly exempted from punishment of the same character.

It is true that the case of Alderman Sturtevant is marked by more prominence than that of either of his associates. Those resolutions and preamble were deliberately prepared by him, and in concocting them, he would seem to have taxed the English language to obtain terms as offensive to the dignity and as defiant towards the authority of this court as a gentleman could well use. He was, moreover, a member of the legal profession, and whatever his opinion may have been of the propriety or legal effect of the injunction, he was bound to know that his duty as a lawyer and a citizen forbade such an attack upon any branch of the judiciary; and that his hand, instead of aiming the blow, should have been raised to stay such an indignity, if offered to this court from any other quarter.

I therefore, not only concur in the propriety of imprisoning him for fifteen days, but if the judgment of the court had been that such imprisonment should be for the full term of thirty days, it would have met with no objection from me. But while I grant the sufficiency of the reasons for punishing Alderman Sturtevant with greater severity than his associates, I cannot admit, that there is just ground for so great a disparity of punishment as the judgment of the court has made between them.

The other Aldermen who voted for those resolutions and preamble, heard them read and deliberately adopted and passed them. It would be a bad compliment to the intelligence of these gentlemen to assume that they did not understand what they were doing. Their official station forbids any such supposition. If they were fit to be Aldermen of this city, they can claim no indulgence on the ground of ignorance of the true meaning and import of those resolutions and preamble, for they could not be misunderstood by any one of common capacity. In substance, they charge a judge of this court not

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only with assuming prerogatives and usurping authority and jurisdiction without color of law or justification, but that he did so with sinister, unjustifiable, unworthy, and interested views—in other words, with dishonest and corrupt motives; and they deliberately avow the purpose, not merely of utterly disregarding the order of that judge, but of rebuking him for making it. Nor can I discover anything in the answer of these aldermen to the interrogatory on the subject of these resolutions and preamble, which offers any palliation of their offence; for, although they disclaim the intention to offer any contempt to the lawful authority of this court, they do not disavow the imputation of unworthy motives to the judge, or that he had knowingly lent himself, as a minister of justice, to aid a device of the plaintiffs to defeat the grant by indirection, and virtually to decide the case without a trial. With this view, therefore, of the position of the aldermen in regard to those resolutions and preamble, I repeat that their offence merits punishment in my judgment, by imprisonment, on the same principle as that of Alderman Sturtevant, though in some less degree.

It must not be supposed that I regard the passage of those resolutions and preamble as being capable (however designed) of impairing the standing, or even wounding the personal feelings, of the individual judge against whom they were directed. Certainly, no one of the judges of this court would feel affected by them, in either of those lights. I treat it as an assault upon judicial authority, and would punish it as such.

The judges, as ministers of the law, are but the servants of the public, but they are the depositaries of a trust which it is most important to the best interests of this community to preserve in its integrity and plenitude. I mean the authority of courts of justice—the respect of the people for the law and those by whom it is administered; and, painful as it may be, and as it certainly is to myself on the present occasion, to vindicate that authority and preserve that public respect by severity of punishment, I regard it as a duty in the performance of which the judges of this court are bound not to falter.

I need hardly say that no public rumors as to the official conduct of any members of the late Common Council could possibly influence my course in this matter; and I allude to

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such rumors merely for the purpose of declaring, as I now do, that were it not for their existence, and the apprehension of its being supposed that a willingness to gratify some public prejudice might have insensibly found its way into my judgment, I should feel much less reluctance than I do, under existing circumstances, in treating the conduct of the parties now before the court with severity.

I have only to add, therefore, that if the punishment in this case had rested solely with me, I should have felt it my duty to have imprisoned every other alderman, besides Alderman Sturtevant, who voted for those resolutions and preamble, for ten days, except Alderman Wesley Smith, who alone has, in some degree, apologized for doing so. He has acknowledged the impropriety of the act, and, in a measure, excused himself, by stating that he did so without due consideration at the time.

For this partial atonement, I should have mitigated his imprisonment to five days.

Alderman Doherty, although he violated the injunction by voting for the grant, had the decency or discretion to vote against the offensive resolutions and preamble, and for taking that course, I agree in opinion with my brethren, that he should not be imprisoned; and, in all other respects, I concur with the judgment of the court.

The general term, which had been adjourned to this day, was then opened, and held by the same judges.

Each of the defendants, except Alderman W. Smith, who submitted, and paid his fine, then appealed to the general term from the judgment pronounced, and from every previous order made at special term.

The counsel for the relators moved in each case to dismiss the appeal, which motions were denied.

The counsel of the parties declining any further argument, the judgment and orders appealed from, in each case, were affirmed. (a)

(a) The following is the form of the judgment in the case of Alderman Sturtevant:

A writ of attachment having heretofore issued out of and under the seal of this court, directed to the sheriff of the city and county of New York, against the above named Oscar W. Sturtevant, for contempt in disobeying an injunction granted in the action pending in this court, of Thomas E. Davis and Courtlandt Palmer, as plaintiff, against the Mayor, Aldermen, and Commonalty of the

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APPEAL from a judgment in favor of the plaintiff for \$4,000. The judgment was entered upon the verdict of a jury, and the cause was now heard upon exceptions taken on the trial.

The action was for injuries to the person of the plaintiff occasioned by the negligence of the defendants, and was tried before Mr. Justice Campbell and a jury, on the 3d of May, 1852.

It appeared in evidence, that, on the 25th of October, 1851, a collision took place on the New Haven Railroad between two trains of cars belonging to the defendants, and that the plaintiff, who was a passenger in a baggage car of one of the trains, had one of his legs broken, and was otherwise severely and dangerously injured.

The principal defence was that the defendant was guilty of

city of New York, as defendants; and the said Sturtevant having been, by virtue of said attachment, attached by said sheriff, and having personally appeared in court; and interrogatories, specifying the facts and circumstances alleged against said Sturtevant, having, by order of this court, been filed, and a copy thereof served on said Sturtevant; and he having been required to answer, and having answered the same; and several affidavits and papers touching the said contempt having been produced and read; and counsel, as well for the said relators as the said Oscar W. Sturtevant, having been heard, and mature deliberation being thereupon had:—

It is now here considered and adjudged that the said Oscar W. Sturtevant has been and is guilty of the misconduct alleged against him in the proceedings, and that such misconduct was calculated to, and actually did defeat, impair, impede, and prejudice the rights and remedies of the said plaintiffs, Thomas E. Davis and Courtlandt Palmer, in their said action against the Mayor, Aldermen, and Commonalty of the city of New York, and that the said Davis and Palmer have, by reason of the said misconduct, been put to a large amount of costs and expenses, to wit, the sum of one hundred and two dollars and twenty cents.

And it is further considered and adjudged, that the said Oscar W. Sturtevant for his said misconduct be imprisoned in the common jail of the city and county of New York, for the period of fifteen days; and further, that a fine of three hundred and fifty-two dollars and twenty cents be, and the same is hereby imposed upon the said Oscar W. Sturtevant, for his said misconduct, and that he stand committed to the common jail of the city and county of New York until the said fine be paid.

And it is further considered and adjudged, that the sum of one hundred and two dollars and twenty cents, part of the said fine, be paid over to the said Davis and Palmer, or their attorneys, to satisfy their said costs and expenses in the premises; and that the residue of the said fine be paid to the clerk of this court, to be disposed of according to law, and that a warrant issue to carry this judgment into effect.

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negligence in taking his place in the baggage car, as the defendants had forbidden that passengers should be so carried, and had caused a printed notice to that effect to be posted up in the car. It was also insisted, that, as the defendant was carried gratuitously, the Company was not liable, there being no contract between the parties. The printed notice, which was produced and read, purported to be a copy of a resolution of the Directors of the Company, passed in August, 1849, declaring that thereafter no passengers should "be permitted to ride in that portion of any baggage car which is used for stowing and distributing baggage."

It was, however, proved on the part of the plaintiff, that he was in a part of the car used as a post-office, and not for stowing baggage; that several other passengers were also there, and that no objection was made to their being there, either by the conductor or by any other servant or agent of the Company. It was also proved that passengers were frequently transported in the baggage cars.

When the evidence was closed, the counsel for the defendants moved for a dismissal of the complaint. The motion was denied, and the counsel excepted.

The judge then charged the jury as follows:

The rule of law is, that a carrier is bound to use the utmost care and diligence in the conveyance of passengers. In this case, if the plaintiff were carried as a free passenger, that circumstance would vary the liability of the defendants in a slight degree.

The question of gross negligence of the defendants is not raised in the answer as to the act of the defendants. It is admitted.

(To this instruction the defendants' counsel duly excepted.)

Where an injury occurs, if both parties are guilty of negligence, the plaintiff cannot recover. The law cannot measure degrees of negligence. The negligence of the plaintiff, however, must concur directly, not remotely, in producing the accident or injury.

(To this charge, as to the plaintiff's negligence, the defendants' counsel duly excepted.)

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The plaintiff here did not contribute to produce the collision itself; and there was not, therefore, such negligence on his part as will defeat the action.

(To this instruction the defendants' counsel duly excepted.)

My view of the law is, that even if the plaintiff were in the baggage car, if the injury did not necessarily grow out of that wrongful act, it would not defeat the action; not even if the plaintiff was in the baggage car contrary to the express rules of the company, if the injury did not grow out of his being there.

(To this instruction the defendants' counsel duly excepted.)

It is not certain that the baggage car is the most dangerous place in the train. In some cases it might not be. The passenger cars might be the most unsafe in some instances. The plaintiff might have been in the passenger cars and have been injured, as in the case of a train being run into by a following train.

But admitting the baggage car was an unsafe place, and the notice was given, I leave it to you to say whether the notice was intended to prevent persons going into the post-office department of the baggage car, and whether the plaintiff was there with the assent of the conductor.

(The defendants' counsel excepted to the submitting this question to the jury.)

If the plaintiff was there with the assent of the conductor, notwithstanding the notice, he was not in fault, unless he was guilty of negligence, which concurred directly in producing the injury.

(To this instruction the defendants' counsel excepted.)

On referring to the railroad act of 1850, § 46, it may be a question under that section, whether it means *in* the baggage cars. This act has nothing to do with the case, for the defendants must have complied with it strictly by posting up the notice in the passenger cars.

The jury will pass upon the following points:—

First.—Whether the plaintiff was in the post-office part of the baggage car with the assent of the conductor? That part of the baggage car was not covered by the notice. I state this as matter of law.

Second.—Was that part of the car in which the plaintiff was at the time of the collision a part of the car used for stowing and distributing baggage, pursuant to the printed notice of the defendants? When not so used, the notice, in contemplation of law, did not prohibit passengers going there.

Third.—Was the plaintiff guilty of any other act than being in the baggage car, which contributed directly to the injury of the plaintiff?

The defendants' counsel excepted to submitting to the jury the question of fact stated in the first of the three special inquiries above stated; and also excepted to the charge of the court as to the effect, or construction, of the notice.

After the charge, the counsel for the plaintiff moved to amend the complaint by striking the word "wilfully" therefrom; which motion was opposed by defendants' counsel, and granted by the court.

(To this decision the defendants' counsel duly excepted.)

The jury, after being out for some time, returned to the court-room, and stated that they were unable to agree on an answer to the question of fact in the first of the three inquiries specially submitted to them; whereupon his honor withdrew the first of the aforesaid three questions from the jury, who then rendered a verdict for the plaintiff, and assessed his damages at four thousand dollars.

A. Hamilton, jr., and *J. T. Brady* for the appellants, the defendants, insisted that the exceptions to the judge's charge were well taken, and that a new trial ought to be granted upon the following grounds:—

I. The plaintiff did not pay for his passage, but was carried gratuitously. The defendants are not therefore responsible for the injury to him, unless occasioned by their gross neglect.

II. The reply admits, and the proofs show, that the plaintiff was not in the proper place for passengers. He was in the baggage car. If he had not been, he would not have been injured. The facts as to this not being in dispute, the law declares that the plaintiff was not free from fault, and he can not therefore recover.

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III. The excuse for the plaintiff being in the baggage car, set up in the reply, namely, that he was there with the assent of the conductor, if proved, does not change the aspect of the case.

(a) The mere fact of riding in the baggage car amounted to an assumption by the plaintiff of any danger or responsibility arising from that position.

(b) No conductor has a right to permit a passenger to ride in a baggage car; and if he does, his act does not bind his principal.

(c) The plaintiff must be presumed to have known that in giving any such permission, the conductor would exceed his authority, just as much as if he had permitted the plaintiff to ride on the engine.

(d) A passenger on a railroad train has power, and is bound to take reasonable care to insure his own safety. If there be a seat in the passenger cars, he is bound to go there; and if he place himself in a dangerous position, he must bear the consequences; and this is true, whether he expose himself to danger with or without the consent of the conductor.

IV. The plaintiff had notice that he endangered his safety, from the position he occupied, and also the notice affixed in the baggage car. Having this notice, and yet exposing himself to injury, he has no claim for damages.

V. If the plaintiff, by riding in the baggage car, increased the risk of injury to himself, and this was negligence which contributed to the injury plaintiff suffered, he cannot recover, although he had no agency whatever in producing the collision. (*Munger v. Tonawanda R. R.*, 4 Comstock, p. 349; 5 Denio, 255; *Beers v. Housatonic R. R. Co.*, 19 Conn. 566.)

VI. That the notice given in evidence put up in the baggage car, must be taken to mean that a passenger should not ride in any part of a baggage car which the company used, though only occasionally, for stowing or distributing baggage.

VII. That affixing the notice in one place in the baggage car was sufficient; and it is wholly unimportant whether the plaintiff did or did not see it, if it was in a conspicuous place.

VIII. That if, by riding in the baggage car, the plaintiff was guilty of negligence which contributed to his injury, then the

defendants are entitled to dismissal of the complaint, although the conductor may have acquiesced in or consented to plaintiff's riding in such car.

IX. The fact appearing from the testimony in the case, that no passenger was injured in the passenger cars, while the persons in the baggage car were either killed or injured, establishes that plaintiff's being there did contribute to his injury.

H. Morrison, for the plaintiff, resisted the motion for a new trial, and argued as follows:—

I. The answer admits, and the evidence, as well as the admission of the defendants on the trial, shows, that the defendants, by their gross carelessness in running their train of cars out of time, and against another of their trains, on a single track, injured the plaintiff.

II. There is no evidence in the case that the plaintiff was in the baggage car at the time of the collision. All the defendants claim as to this, is, that he was in the post-office, which was an apartment separate from the baggage car.

III. If he were in the baggage car, he was not there in violation of any notice of the defendants, pursuant to Railroad Act of 1850.

IV. If the plaintiff were on the baggage car, and not there in violation of any of the notices of the defendants, or of the law, the defendants were not entitled to have his honor the judge charge the jury as required as to any points presented by them.

V. The instructions of his honor the judge to the jury, "when an injury occurs, if both parties are guilty of negligence, the plaintiff cannot recover. The law cannot measure degrees of negligence. The negligence of the plaintiff, however, must concur directly, not remotely, in producing the accident or injury," were correct, and stated with a careful precision and nicety exactly applicable to the case in point. (*Raisin v. Mitchell and others*, 4 Carr & Payne, p. 613; *Bridge v. The Grand Junction Railway Co.*, 3 Mees. & Wels. R. p. 245. See Opinion of Park, B., p. 248. *Smith v. Pelah*, 2 Strange, R. 264; *Bird v. Holbrook*, Moore & Payne, R. vol. i., p. 607.

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Hice v. Kugler, Wharton's R. vol. vi., p. 336; *Marriott v. Stanley*, Manning & Granger, vol. i., p. 569; 2 Stephens' N. P. 1016, Am. edition of 1844; *Clay v. Wood*, 5 Espinasse's R. p. 44; *Wayde v. Lady Carr*, Dowling & Ryland R. vol. ii., p. 555; *Chaplin v. Haws and others*, Carr & Payne, vol. iii., p. 255; *Boss v. Litton*, Carr & Payne, vol. v., p. 407.)

BY THE COURT. BOSWORTH, J.—The plaintiff was injured by two trains running in opposite directions coming in collision. Both trains belonged to the defendants, and were controlled by their agents. The collision resulted from their gross negligence. The plaintiff was, at the time of the collision, in the post-office apartment of the baggage car. It was a much more dangerous location, on the happening of such a collision as took place, than a seat in the passenger cars, and he knew this fact. The conductor acquiesced in his riding in the baggage car: he was, therefore, lawfully in that car; that is, he was not a trespasser by being there. His being there did not tend, directly or indirectly, to produce the collision which injured him. If he had been in either of the passenger cars, the collision would have taken place; but if he had been in a passenger car, he would not have been injured, unless the collision had been productive of consequences to him not suffered by any one in a passenger car.

The collision was not caused, directly or indirectly, immediately or remotely, by his being in the baggage car; but the injury to himself resulted from the fact that he was in that car when it occurred, and he knew when he took his seat in it, that, if a collision took place between that and another train running in the opposite direction, the position was one of much more danger than a seat in either passenger car.

Was that a negligence on his part contributing to produce the injury within the meaning of the rule, that, "whenever it appears that the plaintiff's negligence or wrongful act had a material effect in producing the injury, or contributed towards it, he is not entitled to recover?" No care on the part of the plaintiff could have prevented the collision; no vigilance on his part, after there were any grounds for apprehending a collision, could have saved him from injury. The collision, there-

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fore, was wholly without any fault or negligence on his part, and by the collision he was injured.

It was the duty of the defendants to employ the most scrupulous care and attention, to prevent a collision of their trains running in opposite directions. The plaintiff was under no obligation to the defendants to select a location, with a view to avoid the possible consequences of their neglect of that duty. A neglect of that duty would be generally regarded as imminently perilous to all the passengers on board. Whatever may be believed to be the relative safety, under such circumstances, of those occupying the passenger cars, probably but very few, if any, would take a passage in a train which they knew it was morally certain would come in collision with one going, at the usual running speed, in an opposite direction.

The defendants, at the time of the collision, were not in the lawful exercise of their rights. It was their duty, at all events, to so run their trains that such a collision should not occur. Where an injury is inflicted on a passenger directly and solely by such a collision, if the notices specified in Chap. 140, § 40 of the Session Laws of 1850, p. 234, are not at the time posted up as prescribed by that act, the injured party may recover, even though he be in the baggage car, if there with the knowledge and without objection from the conductor. The fact that there was accommodation for him in the passenger cars will not exempt them from liability in such a case, though the actual results of the collision may demonstrate that, on that particular occasion, he would not have been injured if he had been, at the time of the collision, in the passenger cars.

The defendants' counsel requested the court to charge the jury, "if they believed that the plaintiff, by riding in the baggage car, increased the risk of injury to himself, and this was negligence which contributed to the injury plaintiff suffered, he cannot recover, although he had no agency whatever in producing the collision."

The judge refused to instruct the jury in these terms, but charged them that

"The plaintiff here did not contribute to produce the collision itself, and there was not, therefore, such negligence on his part as will defeat the action,

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"If the plaintiff was there with the assent of the conductor, notwithstanding the notice, he was not in fault, unless he was guilty of negligence which concurred directly in producing the injury.

"Where an injury occurs, if both parties are guilty of negligence, the plaintiff cannot recover. The law cannot measure degrees of negligence. The negligence of the plaintiff, however, must concur directly, not remotely, in producing the accident or injury."

The difference between the charge as made and as it was requested that it should be made, is this:—

The latter assumes that the defendants, in case of a collision occurring from their gross neglect, are not liable for injuries occasioned to a passenger riding in the baggage car, though occasioned by reason of that car being entirely demolished, if the result demonstrates that he would not have been injured if seated in a passenger car.

Whereas the charge declares the rule to be, that in such a case the defendants are liable if the injured person was in that car with the assent of the conductor, unless guilty while there, of some negligence which concurred directly in producing the injury.

For instance, if the plaintiff was there with the assent of the conductor, he was where, as between him and the defendants, he had a lawful right to be; and if, in consequence of the collision, the baggage car was not itself destroyed, but some of the baggage in it was thrown by the collision from the spot where it had been placed, and came in contact with him so as to injure him, the rule that the defendant was guilty of a negligence which contributed directly to his own injury might apply, on the ground that he knowingly and voluntarily selected a place of unusual danger, and the fact of his occupying it concurred directly in producing the injury.

I do not perceive why it may not, with equal force, be answered, that if he had not been in that car, he would not have been injured; and that the gross negligence of the defendants would have caused him no damage if he had been in the car provided for passengers, and in which a proper precaution required him to be seated.

It seems to me that if the defendants are to be held liable in

such a case, it must be on the broad grounds, that if a collision of their trains occurs from their gross neglect, by which a passenger is injured, they cannot be exempted from the consequences, on the ground that he was knowingly in a place more dangerous to his safety in the event of such an occurrence than a seat in the passenger cars, if he was lawfully in the place where he was injured. That the defendants are under an obligation to so run their trains that those going in opposite directions shall not come in collision. That it is gross negligence in their officers and agents not so to run them. That a passenger is under no obligation to take any extra care with the sole view of preventing or mitigating consequences that may result from such a gross neglect of duty on their part.

But for this gross neglect, there would have been no collision and no injury. The only answer the defendants can make is, our gross negligence would not have injured you if you had been in a car set apart for passengers, which, as was well known, was much the safest place of the two, in the event of our running two trains into each other. The injured party may properly reply, I owed no duty to you requiring me to guard against or to anticipate the possibility of such an act on your part, the non-performance of which can exonerate you from liability to compensate for injuries caused by such an act.

In *Munger v. Tonawanda R. R. Co.* 4 Coms. 349, the plaintiff failed to recover damages sustained in consequence of his oxen being run over by the defendants' cars, on the ground that the oxen, having strayed on the track, were there without right, and, as to the defendants, unlawfully. The law imposed on them no duty to guard against an injury to others which could arise only from their own wrong, and which they were not bound to anticipate with a view to prevent the consequences of its possible occurrence. In that case, as will be observed on considering it, the fault or negligence of the plaintiff contributed to produce the collision or act which caused the injury. I apprehend that a careful consideration of all the cases on which the defendants' counsel rely, in support of the rule for which they contend, will show that it is accurately expressed by saying that one party cannot recover from another damages for an injury, when his own negligence or wrong contributed

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to bring about the act or occurrence which directly caused the injury; and that, if his own negligence or wrong did not contribute to produce the act which caused the injury, the party doing the act is liable.

X In *Blyth v. Topham*, Cro. Jac. 158, the plaintiff's mare, straying into a common in which the defendant had dug a pit, fell into it and was killed. It was held that the plaintiff could not recover. The plaintiff had no right in the common; it was his own wrong that the beast was there. She was unlawfully there, and his wrong contributed to the act which caused the injury, viz. her falling into the pit.

+ In *Bush v. Brainard*, 1 Cowen, 78, the plaintiff's cow, in the night-time, went to an open shed, on unclosed wood-land belonging to the defendant, and drank some maple syrup which the defendant had left there. This caused her death. The court held that, the plaintiff having no right to permit his cattle to go at large, his own fault or negligence contributed to produce the act which caused the injury, and, therefore, he could not recover.

X In *Sarck v. Blackburn*, 4 C. & P. 297, brought to recover damages for being bitten by a dog of the defendant, which was, at the time, chained in a yard in rear of the defendant's house, near one of the passages leading to it, and through which the plaintiff was walking when the dog bit him, TINDAL, Ch. J., instructed the jury that "the question will turn upon the point whether there was a justifiable right to be on the spot.

"If a man puts a dog in a garden, walled all round, and a wrong-doer goes into the garden, and is bitten, he cannot complain in a court of justice of that which is brought upon him by his own act. Undoubtedly, a man has a right to keep a fierce dog for the protection of his property; but he has no right to put the dog in such a situation, in the way of access to his house, that a person innocently coming for a lawful purpose may be injured by it. I think he has no right to place a dog so near to the door of his house that any person coming to ask for money, or on other business, might be bitten."

A board was placed on the palings, on which was painted, in letters three inches in length, "Beware of the Dog!"

The Court further charged, "It does not appear to me that

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this notice is sufficient so as to bar the action, if the plaintiff had any right at all to be on the spot, for it seems that he was not able to read."

In *Blackman v. Simmons*, 3 Carr and P., 138, the plaintiff sued to recover damages for injuries inflicted by a vicious bull owned by the defendant.

BEST, J., in his charge to the jury, said: "It appears that this bull was not sufficiently secured. If the plaintiff had gone where he had no right to go, that might have been an answer to the action; but the fact is not so. The plaintiff had a right to be where he was." The defendant was held liable. X

In *Howland v. Vincent*, 10 Met. 371, the plaintiff, in the night-time, went outside of the line of the street, and fell into an excavation dug by the defendant on his own land. The plaintiff was held to be in fault for being where he had no strict right to be, and as the defendant had only done what it was lawful for him to do, the plaintiff failed to recover. X

In *Cook v. The Champ. Trans. Co.*, 1 Denio, 91 (100 and 101), brought to recover for buildings destroyed by being set on fire by sparks and cinders escaping from the smoke-pipe of a boat owned by defendants, the defendants insisted in bar of the action that the injury done was attributable, in part, to the negligence of the plaintiffs "in voluntarily placing their property in an exposed position, and therefore the law would afford them no redress." (P. 99.) X

The court, after discussing the principle and the consequences of upholding it, observed that we must at last "come to the conclusion that, while a person confines himself to a lawful employment on his own premises, his position, however injudicious and imprudent it may be, is not, therefore, wrongful; and that his want of due care or judgment in its selection, can never amount to negligence so as thereby to deprive him of redress for wrongs done to him by others." (Id. p. 101.)

Negligence is a violation of the obligation which enjoins care and caution in what we do. But this duty is relative, and where it has no existence between particular parties, there can be no such thing as negligence in the legal sense of the term. A man is under no obligation to be cautious and circumspect towards a wrong-doer. (5 Denio, 266, 7.)

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A proper application of the principles of these cases, as well as of others relating to the same subject, leaves the plaintiff's right to recover free from all reasonable doubt.

He took a seat in the post-office apartment of the baggage car. The position was injudiciously chosen, and may be assumed to have been known to him to have been a far more dangerous one than a seat in a passenger car. But he took it with the assent of the conductor. He was not there as a trespasser, or wrongfully, as between him and the defendants. So far as all questions involved in the decision of this action are concerned, he was lawfully there. His being there was not such negligence, in the legal sense of the term, as exonerates the defendants from the consequences of injuring him by such culpable negligence as consists in running two trains of their cars so violently into each other as to entirely demolish the car in which he was sitting.

On such a state of facts, the defendants are not at liberty to urge that the plaintiff was voluntarily in an unnecessarily exposed position. The injury was caused directly and wholly by the gross negligence of the defendants. The plaintiff was lawfully in the place he occupied, was passive, did nothing, and was incapable of doing anything.

While in this position, the defendants, by gross negligence, imminently dangerous to the lives of all the passengers in the train, caused him severe injuries. He was under no obligation to them to be more prudent and careful than he was, in contemplation of there possibly being such highly culpable conduct on their part as would, in all probability, endanger his life if he remained where he was, and his personal safety on any part of the train.

Skinner v. London, Brighton, and South Coast R. R. Co., 2 L. and Eq. R. 360; 2 McMull, S. C. R. 404; *Felder v. Louisville, &c., R. R. Co.*, 7 Ad. and Ellis, N. S. 377-378; *Mayn, &c. v. Brooke*.

We all concur in the opinion that no error was committed to the prejudice of the defendants, either in refusing to charge as requested, or in the charge as made; and that the judgment appealed from must be affirmed, with costs.

LAWRENCE v. WILLIAMS and others.

When the breach of a covenant in a lease, not to underlet without the consent of the landlord, is alleged, if the fact of underletting is proved or admitted, it is matter of defence, that the consent of the landlord was given, and the burden of proof is cast upon the defendant.

Where the lease contains a clause of re-entry for the breach of any covenant by the lessee, in an action, by the landlord, to recover possession of the demised premises, it is not necessary to prove an actual entry, before the commencement of the suit.

Section 25 in the title in the R. S. "Of the action of ejectment," dispenses with the necessity of such proof, in all cases whatever.

That section, as it relates not to the form of the action, nor to the nature of the proof to be given on the trial, is one of those general provisions which have not been repealed by the Code.

Judgment for the plaintiff.

(Before DUER, BOSWORTH, and EMMET, J.J.)

Feb. 11, 26, 1853.

THIS was an action by a lessor to recover the possession of the demised premises, upon the ground that the defendant Williams, the lessee, had broken a covenant in the lease, not to underlet without the consent of the plaintiff, and that for such breach, the plaintiff, by the terms of the lease, was entitled to re-enter. The complaint averred a breach of an under-letting by Williams to the other defendants.

Williams answered separately as follows:

The said defendant, John Williams, by A. J. Perry, his attorney, separately answering the complaint of the said plaintiff, denies, that in violation of the said covenant, in said indenture contained, and without the consent of said plaintiff, he has underlet the said premises, or some part or parts thereof, to the defendants in said action named, or either of them, and he denies, that as he is advised, he has broken any of the covenants contained in said indenture.

The cause was tried before the Chief Justice and a jury on the 16th of December, 1852.

The plaintiff proved an indenture of lease executed by the

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defendant, containing the covenant of which the breach was alleged, and a general clause of re-entry, and there rested.

The counsel for the defendant moved for a nonsuit upon the grounds—

First—That no evidence had been given of the under-letting averred in the complaint; and Second—That there was no proof of an actual entry on the premises by the plaintiff before the commencement of the suit.

The Chief Justice denied the motion, and the counsel excepted to his decision.

A verdict was then rendered for the plaintiff, subject to the opinion of the court upon a case, to be heard, in the first instance, at a general term, and with liberty to either party to turn the same into a special verdict or bill of exceptions.

J. N. Platt, for the plaintiff, insisted that he was entitled to judgment upon the following grounds:—

I. The defendant, by his answer, admits that he has underlet the premises, but denies that he did it in violation of the covenant, or without the plaintiff's consent. The breach of the covenant being thus admitted, the duty of proving the matter in avoidance devolves upon the defendant; nor could the plaintiff be called upon to prove a negative in the first instance. *Hopkins v. Everitt*, 3 Code Rep. 150; *McMurray v. Gifford*, 5 Howard, 14.

II. It was not necessary for the plaintiff to show an actual entry on the premises before suit brought, because,

1. The law does not require it, as it is abolished by express statute. (2 Revised Statutes, 4th edition, page 567, sec. 18, 19, p. 306; *Sharp v. Ingraham*, 4 Hill, 116.)

2. The statute expressly forbids the plaintiff either to make a forcible entry, or, having made a peaceable entry, to have kept in possession by force.

It would be absurd to require in the present age, before parties can bring actions, acts which are useless and unnecessary—productive of no benefit to either party, and which would occasion breaches of the peace, if attempted; and which will be followed by criminal punishment. (Tillinghast's Adams

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on Ejectment, 145, 146, marginal paging. Edition of 1830. *Little v. Heaton*, 1 Salkeld, 259; 2 Revised Statutes, 4th edition, p. 306.

L. B. Shepard, for defendant Williams, contended that the motion for a nonsuit ought to have been granted; because,

First.—There was no evidence of a letting or underletting of the premises in question, or any part thereof, by the defendants, as alleged in the complaint.

The traverse in the answer is a distinct denial of the allegation in the complaint. Code, § 149.

Second.—The plaintiff did not show any actual entry on the premises before suit brought. 1 Hilliard, Real Prop. 2d Ed., p. 366; *Chalker v. Chalker*, 1 Connec. R. 79; *Lincoln v. Drummond*, 5 Mass. R. 321.

By THE COURT. DUER, J.—In our opinion, the only reasonable interpretation of the defendant's answer, is, that it admits the fact of underletting, and denies merely that the act was a violation of his covenant, and without the consent of the plaintiff. The denial that the underletting was a breach of his covenant, as denying a conclusion of law, and not the existence of a fact, must be rejected as immaterial. And if the answer is to be construed as averring that the plaintiff gave his consent to the underletting, this was a matter of defence, the burden of proving which rested upon the defendant. The plaintiff was not bound to prove a negative, and in proving the execution and contents of the lease, gave all the evidence that under the pleadings was requisite to maintain the action. (*Mann v. Morewood*, 5 Sand., p. 557; *Catlin v. Gunter*, ante, p. 253.)

The objection that no proof was given of an actual entry by the plaintiff previous to the commencement of the suit, is answered by that provision in the R. S. to which we were referred on the argument (2 R. S. 2d Ed. p. 233, or p. 306), and which we construe as dispensing with the necessity of such proof in all cases whatever.* The commencement of a suit for

* The following is the section referred to:—§ 25. "It shall not be necessary for the plaintiff to prove an actual entry under title, nor the actual receipt of any profits of the premises demanded; but it shall be sufficient for him to show

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the recovery of the land is now equivalent to an entry at common law, and the right of the plaintiff to enter and take possession is all that he is bound to prove upon the trial. It is this construction, as we read the opinion of Ch. J. Savage, which the Supreme Court gave to the statute in the case of *Siglar v. Van Riper* (20 Wend. 414). It is true that the section in the R. S. containing the provision in question is found in the title which treats of the action of ejectment, and that this action, in its name and form, has been abolished by the Code; but the provision relates, not to the form of the action, but to the nature of the proof to be given on the trial, and is, therefore, in our judgment, one of those general provisions which the Code has expressly declared shall be retained (Code, § 455).

Judgment upon the verdict must be entered for the plaintiff.

a right to the possession of such premises, at the time of the commencement of the suit, as an heir, devisee, purchaser, *or otherwise*." The words "or otherwise" were plainly inserted to cover a conditional right of entry, since all other cases are covered by the previous words.

CASES OF PRACTICE
AND
DECISIONS IN SPECIAL PROCEEDINGS
AT THE
GENERAL AND SPECIAL TERMS
AND AT CHAMBERS.(a)

LEROY v. HALSEY.

Rules to be observed in examining a judgment debtor.

The judgment debtor may be cross-examined.

(Before MASON, J.)

Sept. 1851.

THE facts sufficiently appear in the opinion.

MASON, J.—The execution in this case having been returned unsatisfied, Samuel F. Halsey, one of the defendants, was brought up under the two hundred and ninety-second section of the Code, to answer concerning his property. To the question, “Are you a housekeeper?” the defendant answered, “My wife has a lease of the place on which I reside, and owns the furniture, and I reside with her, she having a separate estate.”

The plaintiff’s counsel objected to the last part of the answer, because not responsive to the question, and because, in stating that his wife has a separate estate, he undertakes to give in evidence a fact which can be proved by written evidence alone.

It is undoubtedly true that a debtor, on such an examination,

(a) The cases of practice reported were decided with the sanction of two at least, and nearly all with that of three or more of the justices of the court.

Leroy v. Halsey.

is not allowed to make evidence for himself by stating matters not called for by the question put to him; but he is allowed to state, in his answer, to such facts as are necessary to enable the court to understand the true position of the thing or matter inquired of. A debtor cannot always give a categorical answer to a question skilfully put, upon a knowledge of the facts, and possibly with a view to involve him in difficulty. Thus, in the present instance, if the defendant should have answered "yes" to the question, his answer unexplained would seem to imply that the establishment in which he lived belonged to himself. If he had said "no," his answer might have been contradicted by those who judge only by external appearances; and he might seem to have violated the truth. It was, therefore, proper for him to give in his answer the facts, which he has done, so as to bring out what he conceived to be the exact state of the case. The answer, however, thus given, cannot be considered as conclusive, or even *prima facie* proof, either that his wife owns the furniture, or that she has a separate estate, or as in any way precluding the plaintiff from making farther inquiries into the subject. It is only to be considered explanatory of his position in the house,—apparently the head, and yet having and exercising no ownership or control. The plaintiff is still at liberty, if he thinks proper, to apply for a receiver, and to have the ownership of the wife, and the fact of her separate estate, examined into, in a proceeding instituted for that purpose; and he is also at liberty to examine the defendant further as to the particulars relative to this alleged separate property, so far as to ascertain whether or not the defendant has any interest in it. In this point of view I consider the next question, to wit, "Did you purchase any of the furniture in the house in which you reside?" to have been proper. It was not, as the defendant's counsel contended, an inquiry into the purchase of property which might have been bought a long time ago, and may have been parted with; but the inquiry was limited to property then in the house in which the defendant resided with his wife, and of which he has apparently the possession.

The object of the examination is, to ascertain whether the debtor has any property subject to or exempt from execution,

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which ought to be applied to the plaintiff's claim. He is required to appear and answer "concerning his property," that is, the property belonging to him at the time of the examination, or bound by the judgment; and every question tending to throw light on that subject is pertinent. It is not sufficient that the defendant answer generally that he has no property: the plaintiff may prosecute his inquiries, notwithstanding such an answer. If the defendant is in possession of any property, the plaintiff may ask, when and where and how he obtained the possession, and on what terms he now holds it. If the defendant is not in the possession of any property, he may be asked whether he had any, or was interested in any, a short time previous to the judgment, and what has become of it; and if he answer that he has sold it absolutely, he may be asked what was the consideration of the sale, and what has become of the proceeds, so as to ascertain whether any portion of them is in his hands, or due to him. But if it appear that he has not in his possession, or under his control, any portion of such proceeds, the inquiry respecting such property or its proceeds can go no further. There is in such case nothing for the creditor to receive. If the answers to the questions throw any doubts as to the *bona fides* of the sale, the examination may be thorough on that point; as a fraudulent transfer of property may not afford any protection against a creditor. (*Green v. Hicks*, 1 Barb. Chan. R. 316, 317.)

It is impossible to lay down any particular rules on this subject, which shall be universally applicable, farther than this, that the whole examination must have, for its single object, to ascertain whether there is any property of the debtor which ought to be applied to the payment of the plaintiff's claim; and the extent of the inquiry, in each particular case, must be left to the good sense of the officer under whose direction it takes place, having in view this general object.

An important alteration was made in this 292d section, in the last amendment of the Code: it is, that in an examination under it either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness. He may, therefore, be examined in his own behalf on the subject matter of the direct examination, his examination

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and cross-examination being liable to be rebutted, as provided in §§ 393 and 395.

The witness, therefore, must answer whether he purchased any of the furniture of the house in which he now resides; and he will have ample opportunity in his cross-examination, if not before, to explain all the particulars in relation to it.

And, in the future conduct of the examination, the counsel on both sides will be governed by the rules herein above laid down.

BOGARDUS v. THE ROSENDALE MANUFACTURING CO.

On a demurrer to a bill in equity in the Supreme Court, that court gave judgment for the plaintiff, overruling the demurrer with costs. This court reversed that judgment. The Court of Appeals reversed the judgment of this court, and affirmed that of the Supreme Court at special term, "with costs." The words "with costs" in the judgment of the appellate court, does not, in such a case, mean the costs of that court, but of the court below. A remittitur regularly filed in the court below, will not be taken off after an order has been entered to execute the judgment of the appellate court, without a suggestion from such court, that the remittitur does not conform to its judgment, or has been irregularly issued.

[The decision, in this case, was made on consultation with Chief Justice OAKLEY, and Justices DUEK and CAMPBELL, and with their concurrence.]

Sept. 14, 1852.

THE defendant demurred to a bill in equity filed by the plaintiff in the Supreme Court. That court at a special term overruled the demurrer, and gave judgment for the plaintiff, with costs. An appeal was taken to the general term, and while pending, it was transferred to this court. This court reversed the judgment with costs. The Court of Appeals reversed the judgment of this court, and affirmed that of the Supreme Court at special term, with costs. The remittitur was filed in this court, and an order entered that the judgment of the appellate court be made the judgment of this court, and that the plaintiff have execution thereof. The plaintiff claimed that the judgment of the appellate court gave him the costs

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of that court as well as of this court. The defendant apprehending that such a construction of it might be sustained, moves for an order vacating the order entered, on filing the remittitur, and that the remittitur be taken from the files of the court, to enable him to move the appellate court to correct the remittitur. The affidavits on which the motion is made, state, among other things, that one of the judges of the appellate court informed defendant's attorney, that the judgment, as actually pronounced, only gave to the plaintiff the costs in the Supreme Court up to and including those of the judgment at special term. They also contained an abstract or statement prepared at the time of the decision, by the same judge, of the judgment rendered. This statement declared in terms, that the judgment of this court was reversed, and that of the Supreme Court at special term affirmed, "with costs of the court below."

N. E. Mount, Jr., for defendant.

A. F. Smith, for plaintiff.

BOSWORTH, J.—This was an equity suit. It is the uniform practice of the Court of Appeals, as it was of the court for the correction of errors, not to give costs of the appellate court on reversing the decree of a subordinate court in an equity suit. The remittitur shows that the judgment of this court was reversed, and that of the Supreme Court affirmed "with costs." It is not stated expressly that it is affirmed "with costs of the appellate court." As effect can be given to the words, "with costs," without holding them to give, contrary to the settled practice of the appellate court, the costs of that court, it will probably do justice to all parties, and not be an overstrained construction to hold them to mean such costs as are usually awarded, instead of such as are invariably denied, in such cases.

The judgment of the Supreme Court was one which, by its express terms, gave costs. Therefore a simple affirmance of that judgment, though absolutely silent as to costs, would necessarily have given costs of the proceedings in the Supreme Court, prior to, and including the judgment rendered therein,

D.—I.

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and thus affirmed. The words "with costs," can have no meaning, as applicable to the costs given by that judgment.

But by construing them to mean costs of the proceedings in the court whose judgment was reversed, effect is given to the words, precisely as if the remittitur had read "with costs of the court below." Such costs are usually given in such a case. If the Superior Court had affirmed the judgment of the Supreme Court, the affirmance would have been with costs. The appellate court renders such a judgment as the subordinate court should have done.

I think it proper, therefore, to hold, in this case, that the fair meaning of the words, "with costs" in the remittitur, is the same, as if the words had been "with costs of the court below." The papers before me tend to show that such was the judgment actually pronounced. Under this construction of the legal effect of the judgment of the appellate court, the motion must be denied, as there is nothing in the moving papers to indicate that the remittitur does not accurately conform to the actual judgment of the court.

It has been decided by this court, upon full consideration, that after a remittitur has been regularly filed, and an order entered to carry into effect the judgment of the appellate court, the order will not be vacated and the remittitur taken from the files, without some suggestion from the appellate court itself, that the remittitur does not conform to its judgment, or has been irregularly issued. (*Selden v. Vermilyea et al.*, 3 Sand. S. C. R. 683.)

H. HERSENHEIM v. THOMAS HOOPER and HENRY HOOPER.

Under § 292 of the Code, a judgment debtor, residing out of the city and county of New York, cannot be required to appear before a judge of the Superior Court to be examined concerning his property, after the return of an execution unsatisfied, notwithstanding the judgment was recovered in that court. In such a case, the order can only be made by a county judge of the county where the

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debtor resides, after an execution has been issued to that county and returned unsatisfied; and the order must require the debtor to appear in the latter county.

Chambers, 9th October, 1852.—A judgment was recovered in this court against both defendants. Thomas resided in Kings County; a transcript was filed and a judgment docketed in that county. An execution was issued to the sheriff of that county, and returned by him unsatisfied. On the affidavit of these facts, an order was made by a judge of this court, requiring Thomas Hooper to appear on a day named, before a judge of this court, in the city of New York, to make a discovery on oath concerning his property pursuant to § 292 of the Code.

Thomas Hooper now moved to vacate the order on the ground that it could be granted only by a county judge of Kings County.

C. T. Cromwell, for Thomas Hooper.

Chas. Hen. Smith, for plaintiff.

BOSWORTH, J.—The defendant is a resident of this state, and resided in Kings County, when the execution was issued, and the order was made. Section 292 of the Code is express, that when an execution against the property of a judgment debtor, “issued to the sheriff of a county where he resides,” has been returned unsatisfied, the plaintiff is entitled to an order from the judge of the court, or a county judge of the county to which the execution was issued, requiring such judgment debtor to appear and answer concerning his property before such judge at a time and place specified in the order, within the county to which the execution was issued.

The obvious meaning of the Code is, that a resident debtor shall be brought up for an examination only in the county in which he resides. An execution must be first issued to the county where he resides, and the order must require him to appear at a specified time, and answer within the county to which the execution was issued.

If no judge of the court resides in the county to which the

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execution was issued, the order must be obtained from a county judge of that county. The order must require the debtor to appear before the judge by whom it is made, and at some place within the county to which the execution was issued, which must be the county where the debtor resides. It was not intended that a judge of this court should have proceedings of this kind conducted before him out of the city and county of New York.

The order, therefore, could not properly be granted by any judge except the county judge of Kings County, and so far as it relates to Thomas Hooper, must be discharged.

SALTER v. MALCOLM.

October 8th, 1852.

WHEN a Referee reports that nothing is due to the plaintiff, and it appears from his report that the case had not been heard before him, but that his decision was founded upon the default in appearance of the plaintiff and his counsel on the day appointed for a hearing,—the proper judgment to be entered is a dismissal of the complaint, not an absolute judgment, as upon a verdict. The judgment ought no more to be an absolute bar in such a case, than in that of a nonsuit upon a trial.

So held by DUER, J., to whom the question was referred in the above case; Campbell and Bosworth, Justices, concurring.

ANONYMOUS.

A fee of \$10, not to be allowed for each time that a cause is noticed before a referee.

At Chambers, October, 1852. Costs. The plaintiff had obtained a judgment upon the report of a referee and claimed upon the adjustment of costs, before the clerk, \$10 for each time

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that the cause had been noticed for a hearing. The clerk had refused to make the allowance, and by the consent of the attorneys the question was referred to the decision of the judge at chambers.

It was insisted on the part of the plaintiff that the rejected charge, if not justified by the letter, was within the spirit and meaning of subdivision 8, in § 307 of the Code, which gives \$10 to either party for any circuit or term at which the cause is necessarily on the calendar, and is not reached, or is postponed; and the counsel quoted and relied on the case of *Benton v. Bugnall* (1 Code, R. N. S. 229), as an express decision.

DUER, J.—With all possible respect for the judge who made the decision that has been cited, it is impossible for me to follow it. I cannot say that a day, appointed for a hearing before a referee, is a circuit or term, general or special, or that his private docket, if he keeps any, is a calendar. In order to meet a supposed equity, I cannot stretch a statutory provision to a case which its terms cannot, without violence, be made to embrace. If there is a *casus omissus*, the Legislature must supply it.

Even were the terms of the Code so ambiguous, that by a possible construction they might cover the rejected charge, I still should be very unwilling to allow it. Proceedings before referees, as usually conducted, are sufficiently protracted and expensive, and it is not at all desirable to increase the temptations to delay. I must affirm the decision of the clerk.

OAKLEY, Ch. J., and BOSWORTH, J., concurred.

KNEHUE AND ANOTHER v. WILLIAMS.

In an action to compel the delivery of a document in writing, the court will not set aside the proceedings on the ground that the paper, upon its face, has no value, if evidence to prove value may be given on the trial.

The question whether value can be shown by extrinsic proof is a question of law,

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which, when the document is set forth in the complaint, or is annexed, is proper to be raised by a demurrer.

A warehouse-entry, if evidence of the title of its possessor to the goods which it describes, is as properly a subject of an action for its delivery as a certificate of stock or a bill of exchange.

(Before Duer, J.)

Oct. 9, 1852.

THIS was an action to compel the delivery of a warehouse-entry, of which a copy was annexed to the complaint. The document was entitled "Warehouse Entry," and purported to be an entry at the custom-house of certain merchandise imported by the plaintiffs; but it was not signed by the collector, warehouse-keeper, or any other officer of the customs, nor was it stated to be assignable.

Joachimsen, for the defendant, now moved to set aside all the proceedings, upon the ground that the entry was not, upon its face, a negotiable instrument having value, and, consequently, was not replevisable.

DUER, J.—It is a sufficient reason for denying this motion that the plaintiffs, in the affidavits which they were required to make to obtain a delivery (Code, § 207, sub. 1-6), have sworn that the entry has a certain value; and I apprehend that I have no right now to say that this allegation is erroneous or false. It is true that the paper has no value upon its face, and, apparently, can be of no use to any person holding its possession; but I am by no means certain that this defect may not be supplied by evidence upon the trial. I cannot say that it may not, and will not, be proved, that an original warehouse entry is, by the usage of merchants, an evidence of title, the possession of which is indispensable to enable the importer to dispose of his goods, so long as, the duties being unpaid, they remain in a public store; and it may be, that it is only upon the production of this entry; and only to its possessor, that the goods are ever delivered from the warehouse. These suppositions are not excluded by the mere fact that the entry is not signed, since there may be other means of ascertaining its identity and genuineness, of which the counsel and myself are now ignorant.

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At any rate, the question whether extrinsic proof may be admitted to show the value of the entry, is regarded by me as a doubtful question of law, which can only be properly raised and decided upon a demurrer. There can be no difficulty in raising the question in that form, since the entry, as a copy is annexed and is referred to, may well be considered as a part of the complaint. At present it is enough to say, that, if the document to which the suit relates has no value, the defendant cannot be prejudiced by its delivery; while the plaintiffs, if it has the value they allege, may sustain an irreparable loss, if their proceedings are now set aside.

I do not understand it to be denied, that, if the character and value of a warehouse-entry are such, as I have supposed they may be, its delivery may properly be claimed in an action like the present. It is settled, that a bill of exchange and of lading, and a certificate of stock, may be replevied, and between them and an entry, which is a transferable evidence of title, it seems to me no tangible distinction can be stated.

The motion is denied, but without costs. I cannot say that it ought not to have been made.*

DARBY, Administrator, &c., v. CONDIT.

Security for costs cannot be required of an executor, administrator, or trustee, under § 317 of the Code, as amended in the session of 1852, merely upon the ground that the estate which he represents is insolvent.

The power given to the court of requiring security from an executor, &c., is strictly discretionary.

(Before OAKLEY, Ch. J.; DUER and CAMPBELL, J.J.)

General Term, October 16, 1852.

APPEAL from an order at chambers, denying, with costs, a motion on the part of the defendant, that the plaintiff should be required to file security for costs.

* This decision was approved of, upon consultation, by all the judges.

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E. F. Treadwell, for appellant, said that by the last addition made to § 317 of the Code, the court had power to require security for costs from the plaintiff in all the cases mentioned in the section. The cases mentioned in the section were suits by an executor, administrator, or trustee; he therefore insisted that in all such suits the court was bound, upon motion, to require the security, provided it appeared that the defendant would probably lose his costs unless it were given. Here the affidavits which he had read alleged that the estate was insolvent, and the allegation is not denied.

Packard, contra.

OAKLEY, CH. J.—The section upon which the defendant's counsel relies declares in terms that an executor, &c., shall not be personally liable for costs, except for mismanagement or bad faith in the action. No mismanagement or bad faith is imputed to this plaintiff. It is not pretended that, should he fail in the suit, it is at all probable that a judgment for costs could be obtained against him. By granting this motion, therefore, in the form in which it is made, we shall render the plaintiff personally liable for costs from which the Code declares he shall be exempt. To render him liable upon a bond or undertaking, when he cannot be rendered liable by a judgment, would be to defeat the intention of the Legislature in his favor. It would be a virtual, though indirect, repeal of the law. We are clearly of opinion, that the discretionary power which is given to the court can only be exercised when it is rendered probable, that a judgment, directing the plaintiff to pay the costs, will be given; and that the security, when required, must, in all cases, be made to depend upon the judgment,—that is, by its terms is not to be valid, unless such a judgment shall be rendered. We are also of opinion, that the security ought not to be required, even when the estate is insolvent, unless it also appears that the plaintiff is himself insolvent. When he is solvent, the judgment will be a sufficient security.

When the Legislature says that the court “may” exercise a certain power, the word “may” will, in some cases, be construed as imperative; but never when, as in the present case,

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the words "in its discretion" are added. The power is then discretionary, in the fullest sense of the term. We are not prepared to say in what cases the broad discretion, which has been given to us by the section under consideration, will be exercised; but we are satisfied that cases in which it can properly be exercised will rarely occur.

The order appealed from is affirmed, with \$10 costs to the plaintiff, to abide the event.

ALDER v. BLOOMINGDALE IMPEADED WITH SCHMIDT.

The words, "any instrument for the payment of money only," in § 152 of the Code of 1851, mean an instrument which, on its face, is evidence of the debt which is claimed to be due.

Hence, when not only the instrument itself, but extrinsic facts, are necessary to be proved to enable the plaintiff to recover, the existence of these facts, as constituting in part the cause of action, must be averred in the complaint.

A promissory note, in a suit against an endorser, is not an instrument for the payment of money only, since, to enable the holder to recover, a regular demand of payment and notice of refusal are necessary to be proved.

Hence, a complaint against an endorser containing no averment of these facts, is bad upon demurrer.

(Before Duer, J.)

At Special Term, Oct. 10, 1852.

THE action was against the defendant Schmidt as the maker, and Bloomingdale as the endorser, of a promissory note for \$150. The complaint set forth a copy of the note, and averred that it was duly endorsed to the plaintiff before it became due, but contained no averment that it had been duly presented for payment to the maker, and that due notice of its dishonor by him had been given.

To this complaint, Bloomingdale, the endorser, demurred.

G. A. Mayer, for the defendant, cited 5 How. Prac. Ca. 6.

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P. T. Joachimsen, contra, cited 5 How. Pr. Ca. 109.

DUER, J.—As it seemed to me that the demurrer raised a new and important question of pleading under the Code, I have consulted my brethren, and they concur in the opinion that I now give.

The case turns entirely upon the construction to be given to a clause, which appears for the first time in the amended Code of 1851. Hence, the two cases of *Spelman v. Wader*, and *Gay v. Paine* (5 How. P. Rep. 6 id., p. 107), which were cited on the hearing, have no application, since they were both decided before the clause in question was enacted. In the revision of 1851, it was added to § 162, which provides, that the performance of a condition precedent may be averred in general terms, and the words added are as follows: "In an action or defence founded upon an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party, a specified sum which he claims."

The question now to be determined is, whether a negotiable promissory note, within the true meaning of this provision, and as against the endorser, is an instrument for the payment of money only. If it is, the complaint is sufficient, and the demurrer must be overruled; if it is not, the general rule that a complaint must set forth all the facts which constitute the cause of action, all which he is bound to prove in order to maintain his suit (*Garvey v. Fowler*, 4 Sandford, 666), must prevail, and the demurrer, consequently, be sustained.

The words "an instrument for the payment of money only," if strictly and literally construed, mean an instrument which creates no obligation on the part of the person who is sought to be charged, other than for the payment of money; which contains on his part, no other promise, stipulation, or covenant, whatever; but the consequences of this literal construction are so unreasonable that we cannot believe that it expresses truly the intent of the framers of the Code and of the Legislature. A contract in writing for the building of a house between the owner and builder, is, on the part of the owner, an instrument for the payment of money only, although the payments to be

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made by him, invariably depend upon the completion of the whole or of portions of the work by the builder. Hence, if the clause in question is applicable to such a contract, as it must be, if its literal construction be adopted, it will be sufficient for the builder, in an action against the owner, to set forth in his complaint a copy of the agreement, followed by an averment, that there is due to him thereon from the defendant a specified sum which he claims, without averring the completion of the whole or any part of the work he had stipulated to perform; or to state the proposition in a more general form, it will never be necessary, in an action founded upon a written agreement, to aver, either generally or specially, the performance of a condition precedent, although the liability of the defendant for the payment of the sum, which is claimed to be due, depends solely upon its performance.

It may be said, that, in judging of the character of an instrument we must look at the stipulations of both the parties, and hence that an agreement which binds either party to the performance of any act, other than the payment of money, is not an instrument for the payment of money only within the meaning of the Code; but this construction by no means removes the difficulty that I feel, in assenting to the construction which the plaintiff's counsel urged me to adopt. There is a large class of contracts, strictly unilateral, in which the liability, and that a liability for the payment of money, of the only party who is bound, depends alone on the happening of a contingent event, and to all these, according to the argument, this new provision of the Code must be construed to apply. A policy of insurance, for example, contains no stipulations on the part of the assured, and it is only for the payment of money that it binds the underwriter. Hence, in an action upon a policy, if it must be held to be "an instrument for the payment of money only," it will not be necessary to aver in the complaint, even the happening of a loss, much less the time when, the place where, or the peril from which it occurred. It will be sufficient to set forth the policy, and to aver that, by force of the instrument, the sum which is claimed is due from the defendants; and these remarks equally apply, not only to every form of insurance, but, with rare exceptions, to every contract of indem-

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nity. That the Legislature meant that the clause in question should be applied to such cases is most improbable, and it is quite incredible, that the authors of the Code meant to sanction a mode of pleading, so loose, and vague, and indefinite, so utterly barren of the information that ought to be given, as to be, in reality, more objectionable than any of the ancient forms of pleading, which they determined to abolish. A construction that can only be justified by attributing this intention to them or to the Legislature, I cannot hesitate to reject.

Nor is this construction necessary to be adopted, in order to give effect to this new provision of the Code. I am satisfied that its intended purpose will be fully answered, by limiting it to the cases, in which the obligation created by an instrument for the payment of money only, is not only certain, but simple and absolute; and to effect this, the word "only" may well be understood to mean, not merely exclusive of any other promise or stipulation, but free from any condition or contingency. In my judgment, the clause is only applicable, where the instrument set forth in a complaint, is upon its face evidence of the debt, which is claimed to be due, evidence, not merely of the right of the plaintiff to recover, but of the liability of the defendant to pay, so that, in all cases, where proof, not merely of the instrument itself, but of extrinsic facts, is necessary to be given, the existence of the facts must be averred in the complaint. It is this construction that was virtually adopted by this court, in the case of *Lord v. Cheesebrough* (4 Sand. 696), in which it was held that, in an action by the endorsee of a promissory note, against the maker, the transfer and delivery of the note to the plaintiff must be distinctly averred. The very ground of this decision was, that when the right of the plaintiffs to maintain the suit, depends upon something more than the instrument itself, the additional facts must be averred in the complaint. Applying the principle to the case before me, it necessarily follows, that the demurrer must be allowed. The instrument set forth in the complaint, is no evidence of a debt due from the defendant who demurs. A negotiable note, although endorsed, contains no promise of payment on the part of the endorser, since, unless we resort to the contract, which the law implies, the endorsement is nothing

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more than an order upon the maker of the note, to pay its contents to its lawful holder. Let it be admitted that, the same effect must be given to the instrument, as if the contract which the law implies, were expressed in terms, the contract of the endorser is not, like that of the maker, an absolute promise to pay the note at maturity. It is a promise to pay, provided the payment shall first have been properly demanded of the maker, and due notice of his neglect or refusal shall have been given. Such demand of payment, and notice of dishonor, or a statement of facts by which they are excused, the plaintiff must prove upon the trial, and the facts thus necessary to be proved, as they constitute in part the cause of action, must be averred in the complaint. The averment, according to the decision of the supreme court, in *Gay v. Paine*, may now be made, in general terms, but in some form, general or special, it is indispensable. I am not prepared to say, that a complaint, in which it is omitted, may not, in some cases, be amended upon the trial, but I must hold, that it is bad upon demurrer.

A single topic remains to be noticed. It was strongly urged by the counsel for the plaintiff, that the new provision in the Code was intended by the Legislature, as a mere re-enactment, with only a necessary change of form, of the former statute, which permitted a promissory note, or bill of exchange, to be given in evidence, under the money counts, provided a copy had been annexed to the declaration, when served, and it was therefore insisted, that in suits upon these instruments, no averment that the Legislature had judged to be unnecessary, ought now to be required. Some force might be justly allowed to those considerations, had the provision in the Code been confined to negotiable paper; but it is not thus limited, and we have no right to narrow the construction of the general terms that are used, nor to give to them any other than an uniform and consistent interpretation. We cannot adopt a rule in relation to negotiable paper, different from that, which all must see, and the counsel admitted, it would be our duty to follow, in an action upon a policy of insurance. The words of the Code include every instrument for the payment of money only. There can be but one proper definition of such an instrument. To all contracts that the definition embraces, the provi-

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sion must be applied, and to none that it excludes. It has been shown, that it excludes the contract of an insurer, and it must, exactly for the same reasons, exclude that of an endorser.

The defendant is therefore entitled to judgment, but the plaintiff, upon the payment of \$10 costs, may amend the complaint, and ten days are allowed him for that purpose.

HARTHOUSE v. RIKERS.

Where, on examination, supplementary to execution, it appeared that the judgment debtor was a public carman, was a house-holder, and had a family for which he provided, and had "one horse, a harness, and cart," held that they were exempt from execution, and came within the definition of the word *team*, as used in the act of 1842, ch. 157

(At Chambers, Oct. 23, 1853.)

JUDGMENT was had against the plaintiff for costs of the action. On proceedings supplementary to execution, the examination disclosed that he was a public carman, was a house-holder, and had a family for which he provided, and had "one horse, a harness, and cart," which were exempt from execution, provided they came within the proper definition of the word "team." Defendant insisted that the cart was not exempt, moved for a receiver, and that the cart be delivered over to the receiver.

BOSWORTH, J.—(On consultation with all the other judges of the court.) A team is "two or more horses, oxen, or other beasts, harnessed together to the same vehicle for drawing, as to a coach, chariot, wagon, cart, sled, sleigh, and the like.—Webster's Dic., unabridged. Team-work is "work done by a team, as distinguished from personal labor."—Id.

The object of exempting the team of a house-holder, was doubtless to enable him to do team-work. Horses, without harness or vehicle, would be of but little service relatively. *Morse v. Keyes*, 6 How. P. R. 18, 21, concedes that a "harness" is within the meaning of the word team, but not the

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vehicle to which the team may be harnessed. This concession seems to be a consequence of the definition given by the court of the word "team." The court said: "A team is said to be two or more horses or oxen harnessed together." I think Webster's definition better accords with the common understanding of the meaning of the word.

However inartificial the expression may be, yet the phrase, "a one-horse team," is often used, and expresses a clear idea to the common mind. Unless the word "team," as used in the act of 1842, ch. 157, includes that, then a single horse, harness, and cart, would not be exempt, though used together by a house-holder as a team, to do team-work, and though necessary for the support of his family.

I think a team, within the meaning of that act, means horses or oxen harnessed to a vehicle, and includes the three, and that though there be but a horse, harness, and cart, instead of two horses, harness, and a wagon, they are exempt from execution, if of less value than \$150, and are necessary for the owner's support, he being a house-holder, or having a family for which he provides.

Under a contrary construction, the act, so far as it exempts a team, would have practically no application to this city. The "team" of a carman, would not be a team within the meaning of the act.

I think it is exempt from execution, and the motion for a receiver, and that the cart of the plaintiff be delivered to such receiver, is denied. (Vide *Hutchinson v. Chamberlin*, 11 Leg. Ob. 248.)

BOWMAN v. SHELDON.

There may be a reference of any specific question in any action where the taking of a long account is necessary.

An attorney, who has an action pending against a client for professional services, may have a reference for the purpose of ascertaining what amount of compensation he is entitled to, as attorney, for services and disbursements in the suits which he has conducted for the defendant.

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The reference in such a case will be analogous to the former practice, in relation to the taxation of costs, where the question of retainer and the ultimate right of the attorney to recover is reserved.

The amount thus reported will not necessarily be the limit of such recovery.

(At Chambers. CAMPBELL, J.)

Oct. 28, 1852.

The facts appear in the opinion of the judge.

Bowman, in person.

A. Underhill, for defendant.

CAMPBELL, J. (with the concurrence of all the judges).—This action was commenced to recover compensation from the defendant for attorney and counsel fees and disbursements in general suits and proceedings in different courts. The plaintiff having been required by the defendant to tax his attorney's bills, procured the taxation of several of them. On application to one of the justices of the Supreme Court to tax a bill where the costs accrued since the Code, the justice declined doing so, on the ground that there was no authority to tax costs given by the Code, except when they enter into the judgment, and that in such cases they are adjusted by the clerk. For the purpose of obtaining a taxation or adjustment of this bill, and some other bills of small amounts in old suits, the plaintiff now applies for a reference.

It was objected by the defendant that there was now no such thing as taxation of attorneys' costs as between attorney and client; that the attorney's compensation depended upon an agreement express or implied; and that an action by him against his client was like all other actions for services rendered, and if the trial of such action would involve the examination of a long account, it must take the usual course, and the whole action and all the issues be referred. To such reference the plaintiff objected, insisting upon his right to try the issues as to his retainer, and the compensation to which he was entitled for counsel fees, before a jury.

The first sub-division of § 271 of the Code provides, that the court may order a reference "where the trial of an issue of fact

Brewster v. Hodges.

shall require the examination of a long account on either side, in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein." Now one of the questions of fact in this case is, what amount of compensation the plaintiff would be entitled to for his services as attorney, and for his disbursements in the various suits which he may have prosecuted or defended for the defendant, provided he shall on the trial establish his right to recover. Strictly speaking, now, as between attorney and client, there are no taxable costs. The compensation of the attorney depends upon agreement, express or implied, with his client. But compensation is given to the client, if successful in the litigation, for these very services rendered by the attorney; and in ordinary cases, perhaps, the implied agreement would be, that the attorney should be entitled to recover the same compensation from his client. I see no difficulty, therefore, in cases like the present, in ordering a reference, for the purpose of ascertaining what amount of compensation an attorney may be entitled to for his services and disbursements, provided he shall afterwards, on the trial, establish his right to recover. The reference in such case would be analogous to the former practice in relation to the taxation of costs between attorney and client, which only settled the amount, and not the right to recover. As the law now is, such amount may not always be the limit of the recovery. It may perhaps, on the trial, be enlarged or diminished by the jury. But by such reference, the taking of a long account on the trial would be prevented. The motion for such a reference is therefore granted, but without costs to either party.

BREWSTER AND OTHERS v. HODGES AND PECK.

October 29th.

THE questions raised turned upon the proper construction of § 219 of the Code, and the judges consulted by Campbell, J., were all of opinion that, upon a motion to dissolve an injunction

D.—I.

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order granted during the pendency of an action under the last clause of that section, the only question to be considered is, that of fraudulent intent. Affidavits denying the debt sworn to by the plaintiff, cannot properly be received. They were also of opinion, that the effect of the temporary injunction, that can alone be properly granted in such a case, is not to restrain any removal or disposition whatever of the defendant's property, but only such a removal or disposition with an intent to defraud creditors. The words of the clause under consideration are, "when during the pendency of an action, it shall appear by affidavit, that the defendant threatens, or is about to remove or dispose of his property with intent to defraud his creditors, a temporary injunction may be granted to restrain *such* removal or disposition."

NILES v. LINDSLEY,

Where the claim of title to real property arises on the pleadings, and the plaintiff recovers a verdict, he is entitled to costs of course.

If the defendant puts the title in issue and compels the plaintiff to prepare to prove it, he cannot relieve himself from the liability, by admitting the title on the trial.

The only evidence that can be received as to whether or not "the title came in question at the trial," is the certificate of the judge who tried the cause.

October, 1852.

This was an action of trespass upon real estate. The complaint alleges that in 1847, and until the time of the commencement of the action, the plaintiff was seized in fee simple and possessed of fifteen lots in the 19th ward of the city of New York.

That in 1850, the defendant unlawfully entered upon the lots and carried away a large quantity of earth, which was itself valuable, and also injured the market value of the lots by defacing them.

The answer denies any knowledge or information sufficient to form a belief as to the plaintiff's ownership, and then alleges that the defendant bought the earth, and obtained leave to

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enter and cart away, from an alleged agent of the plaintiff, whom he paid for the same, and denies that he (defendant) damaged the lots.

It appears from the pleadings that the plaintiff was not in the actual possession at the time of the trespass.

The cause came on for trial on the 19th day of October, 1852, before the chief justice, and the plaintiff recovered a verdict for six cents.

The plaintiff's attorney noticed his costs for adjustment, when the defendant's attorney obtained an order to show cause on the 26th October why an order should not be granted "directing the clerk not to enter judgment against the defendant for any costs of the plaintiff, but that he adjust the defendant's costs in the action and enter judgment therefor in his favor against the plaintiff."

E. L. Fanoher, for the motion.

1. No claim of title to real property arises on the pleadings. The defendant did not in his answer make any claim of title to the lots, nor did he dispute the plaintiff's title; on the contrary, both points of defence raised by the answer, viz. that "defendant entered by permission of plaintiff's agent;" and, 2d, that "other trespassers, and not defendant, caused any injury that was done," both necessarily and expressly assume that the title was vested in the plaintiff.

2. On the trial plaintiff's title was admitted.

3. The mere fact that the action was for a trespass on lands, does not entitle plaintiff to costs. There must be "a claim of title," or an issue involving a dispute as to title arising on the pleadings, or called in question at the trial, and a recovery on that question. (*Burhans v. Tibbits*, 7 How. Pr. R. 74, 77.)

This was not the case here. Defendant failed to prove the authority of the agent, and plaintiff had a verdict for breaking his close.

The answer of leave from an agent, and an attempt to prove it, expressly admit plaintiff's title; then he cannot have costs if he recover less than fifty dollars. (*Wickham v. Seeley*, 18 Wend. 649.)

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Other authorities show that plaintiff cannot have, but must pay costs. (*Brown v. Moyers*, 7 Wend. 495; *Chandler v. Day*, 10 Wend. 563; *Koon v. Mazurson*, 6 Hill, 44.)

W. W. Niles, contra.

1. A perfect issue, on the question of title, was raised by the pleadings (Code, § 149), and the subsequent allegation that defendant committed the acts complained of, by authority of an alleged agent of plaintiff, does not do away with that issue; for aught the court knows he was agent for plaintiff, who was sub-landlord, or even a tenant of the owner.

2. The alleged points of defence do not "assume that plaintiff was owner;" a tenant in actual possession may maintain an action for trespass, &c.

3. In this case, however, we also sue for an injury to the freehold; in such case possession is not sufficient.

We must, therefore, allege and prove title, or fail as to that part of the case.

4. It is admitted by the pleadings that the plaintiff was not in the actual possession; then he could have no verdict at all except by alleging and proving title.

The claim of title, therefore, necessarily arose upon the pleadings. The counsel cited 11 Wend. 639 and 19 id. 509.

DUER, J.—I am inclined to think that the certificate of the justice who tried the cause, is the only evidence I can receive as to whether or not "the title came in question at the trial." I must, therefore, in the absence of that, confine myself to the pleadings.

I am of opinion that the question of title arises upon the pleadings within the meaning of the statute. It is directly put in issue by the first portion of the complaint and answer. The allegation in a subsequent part of the answer, that defendant went upon the lots by leave of the plaintiff's agent, does not do away with the effect of that issue. As the plaintiff was compelled to come prepared to prove title, the admission of his title by defendant at the trial ought not to deprive him of his right to costs; and even could I adopt the defendant's present

Anonymous.

construction of his answer, I think, that having taken issue upon the claim of ownership in the complaint, he is estopped from denying that the plaintiff was bound to prove title upon the trial. If he meant by his answer to admit the title, he should not have made the issue.

The motion must therefore be denied with costs.

The CHIEF JUSTICE, CAMPBELL and BOSWORTH, Justices, concurred. (a.)

ANONYMOUS.

In an action against husband and wife, for a tort committed by the wife, neither can be arrested.

At Chambers, October, 1852. Upon an application to Mr. Justice CAMPBELL, for an order of arrest against a husband and wife, in an action for an assault and battery charged to have been committed by the wife alone, he was of opinion that the general words of the Code permitting the arrest of a female for "a wilful injury to person, character, or property" (§ 178), have not altered the rule of the common law, which exempts a married woman from arrest in all cases whatever; and he was also of opinion that the Code, in its reasonable construction, does not authorize the arrest of the husband in any action founded solely either upon the contract, or tort of the wife. He therefore denied wholly the application.

The other judges upon consultation approved his decision.

(a.) *Ex relations* W. W. Niles, Esq.

Bridge v. Payson.

GEORGE BRIDGE v. IRA F. PAYSON AND THOS. V. ROGERS.(a.)

A denial of the jurisdiction of the court, in an answer, must show, that the court had no jurisdiction when the suit was commenced. Hence, in an action against joint debtors, commenced before the amended Code of 1851 was in force, an answer denying the jurisdiction of the court, upon the ground, that one of the defendants was a non-resident, and that the summons had not been served upon him, was bad, as showing not an original want of jurisdiction, but only that all the necessary parties were not yet before the court.

(At Special Term, Oct. 9, 30: 1852.)

This cause was originally commenced against Ira F. Payson alone, and the complaint alleged a sale of goods to him in the usual form.

The answer denied the indebtedness, and also alleged that if the defendant was indebted, it was for goods sold to Ira F. Payson & Co., a firm in Michigan, and that the firm was composed of the above defendants.

On these pleadings the cause was tried, and a verdict rendered for the plaintiff.

On a bill of exceptions taken at the trial the defendant appealed from the judgment to the general term, where the judgment of the special term was reversed with costs.

Leave was given to the plaintiff to amend, by making Thomas V. Rogers a party defendant at any time within twenty days.

The plaintiff availed himself of the permission, and the amended complaint was against both defendants for goods sold and delivered in the usual form, and claimed \$456²²/₁₀₀, with interest.

This complaint was verified in November, 1851. In January, 1852, the defendant Payson put in a separate answer to the amended complaint, which contained,

1st. A denial upon information and belief of the indebtedness.

2d. As a separate defence, that the defendant Rogers resided at Flint, in Michigan, and had not been served with a summons in the city of New York, and therefore that this court has no jurisdiction of the action.

(a) Reported *ex relatione* H. Brewster, Esq.

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To the second defence containing new matter, the plaintiff replied that Ira F. Payson was a resident within the city and county of New York, and the summons was served on him, and issued against Thomas V. Rogers, and endeavors made to serve it on him up to May 16th, 1852, and that he could not be found in the city, and that by statute, Payson was bound to answer, and that consequently the court had jurisdiction. This reply was verified on the 18th day of May, 1852.

The defendant Payson demurred to the reply, and specified as a ground of demurrer, that the action was commenced before the amendment of the statute referred to, and therefore the reply was insufficient, &c.

H. R. Pierson, in support of the demurrer, insisted that by the Code of 1849, § 33, this court had no jurisdiction of this action, and that the statute passed after the answer and before the reply, could have no application to this suit.

H. Brewster, contra, made the following points:—

1. That this being matter in abatement, could not be set up after answering on the merits.

2. That as a complaint may be served with the summons, the defendant served cannot go out of the complaint and answer mere matters of practice which should properly be raised on motion.

3. That as to Rogers the suit was not commenced, the service of summons being the commencement, and that as service in May, 1852, would give full jurisdiction, therefore, after the amendment to § 33, in 1852, the suit was correctly in court, and could proceed under § 127 of the Code.

BY THE COURT. DUER, J.—In the view that I have taken of this case, it will not be necessary for me to express my opinion on the question decided in *Gardener et al. v. Clark* (6 Prac. R. 449), where the Supreme Court held, that the same order of defences obtained now as under the old system of pleading.

Our former decision in this case, by which I am bound, proceeded upon the contrary doctrine, namely, that all the defences

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upon which the party relies, whether operating in abatement or in bar, must be set up in the same answer. (*Bridge v. Payson*, 5 Sandford, 210.) It is a different question in what order the issues so made are to be tried, and that question is not now raised.

The subject matter of this suit, so far as the nature of the action is concerned, has always been within the jurisdiction of this court, and the residence of the parties did not necessarily deprive this court of jurisdiction; for, all that the former Code required in case of non-residence was a personal service of the summons, within the city of New York.

There was nothing in the Code that required the service on all the defendants on the same day, or within any specific time, or that the service on the non resident debtor should first be made, and as the complaint may be served with the summons, it cannot show whether such service has been made.

If the defendant who had been served thought there was unreasonable delay in proceeding to serve the other defendant, he could apply, under § 274 of the Code, to dismiss the complaint for want of prosecution.

If the plaintiff chose to bring the case to a final trial, and it appeared that under this statute, such steps had not been taken as vested this court with jurisdiction to dispose of the cause, we have held that the complaint should be dismissed.

But if the right of serving the summons on Thomas V. Rogers, when he should be found in New York, existed at the time the answer of Payson was put in, then the fact that it had not been yet served, did not necessarily deprive the court of jurisdiction in this particular case, and there is nothing in the answer going to show that the plaintiff had not such right.

By allowing the amendment to bring him in, this court at general term, had previously decided, that it was then in time to make such service as would give the court jurisdiction, and if so, I certainly cannot decide on demurrer, that a delay of twenty or sixty days to find the party, made it too late to take the proper steps thereafter to bring the party within the jurisdiction of the court.

In other words, the proper service by which, and by which alone, the jurisdiction of this court over the persons and subject

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matter would become perfect, is a matter of practice, and is not the proper subject of defence in the answer. This question must be raised in a different way when the want of due diligence or sufficiency of any excuse can be considered.

This part of the answer being therefore bad, judgment must be rendered for the plaintiff on this demurrer.

This makes it unnecessary to pass upon the question as to the effect upon this suit, of the recent amendment of the Code.

If the service upon Rogers in the city of New York, at the time the amendment took effect, would have been effectual to clothe the court with jurisdiction, and I think it would, I incline to the opinion that the amendment, which now makes the service on one joint-debtor in the city sufficient to confer jurisdiction, dispenses with further efforts to serve the absent party, and confers jurisdiction on the court to determine the cause.

The defendant, however, can hereafter raise the question in such form as he may be advised, and when it comes properly before the court, that point can be determined.

Judgment for plaintiff, on the demurrer, with costs to be allowed, as costs in the cause.

(Affirmed upon consultation by all the judges.)

E. AND R. RICH v. J. HUSSON, IMPLEADED WITH LYNCH.

Suits commenced before the Code are excepted from the repeal of all former statutes in relation to costs.

In such suits the right to costs, and the amount to be recovered, depend upon the statutory provisions in force when the Code was enacted—except in relation to those subsequent proceedings to which the Code may apply.

A proceeding in a suit means an act necessary to be done to attain a given end, and the definition neither includes the right to recover costs nor the amount to be recovered.

The plaintiff, in an action commenced before the Code, having obtained a verdict

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for \$50 only, held. that the defendant, under the R. S., was entitled to recover costs.

Held, also, that no judgment for the defendant for his costs, having been entered by the direction of the judge who tried the cause, or by the court, the judgment entered was irregular.

For this and other irregularities, judgment set aside with costs of motion.

(General Term. Before OAKLEY, C. J., DUER and CAMPBELL, J.J.)

Oct. 20, 1852.

THIS was an action of assumpsit, commenced before the Code, against the defendants as partners. It was transferred from the Supreme Court, and since the transfer two new trials had been granted, and upon the third trial the plaintiff obtained a verdict for \$50, for which sum, with six cents costs, judgment in his favor was then entered. Under the Code a plaintiff who, in an action for the recovery of money, obtains a judgment for \$50, is entitled to full costs, but in a case governed by the provisions of the R. S., unless the plaintiff recovers more than \$50, the defendant is entitled to costs. The attorney for the defendant, believing that his client was entitled to a judgment for costs, procured the bill which he claimed to be taxed by a judge, and deducting from its amount as taxed, the \$50 for which the jury had rendered a verdict for the plaintiff, without any direction or order of the court, or of a judge, entered a judgment for the balance in favor of the defendant. No notice of any of these proceedings was given to the plaintiff's attorney, and the defendant's attorney, apprehensive that for this reason his judgment was irregular, then served a copy of his bill of costs and notice of its taxation, upon receiving which the plaintiff's attorney obtained an order staying his proceedings, and requiring him to show cause why the judgment he had entered should not be set aside and the clerk be directed to adjust the costs in favor of the plaintiff.

The motion was first heard by the Chief Justice at chambers, and his decision was now brought before the general term.

A. Wight for plaintiff.

E. Sandford for defendant.

BY THE COURT. DUER, J.—As there can be no vested right

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in the costs during the pendency of a suit, both the right to recover them and the amount to be recovered must depend upon the legal provisions which are in force when a judgment is obtained. It is for this reason that it has been frequently decided that a change of statutory provisions in relation to costs is just as applicable to existing as to future suits, and *pari ratione* the same construction must be given to a repeal.

The 303d section of the Code declares that "all statutes establishing or regulating the costs or fees of attorneys in civil actions, are repealed," and unless the operation of these words is restricted by other provisions in the Code, or by subsequent legislation, the repeal must doubtless be construed to embrace existing suits so as to deprive each party of any right to costs therein, in any event, as against the other. It is hardly possible, however, to believe that such was the intent of the authors of the Code and of the Legislature, and we are satisfied that an exception in favor of suits then pending and undetermined, which it must have occurred to them was reasonable and just, is created by section eight in the introductory part of the Code. That section declares that the second part of the act, which includes section 303, "relates to civil actions commenced in the courts of this state after the 1st day of July, 1848, except when otherwise provided therein," plainly meaning except such provisions as are declared in terms to relate to suits previously commenced. This general declaration of the intent of the Legislature, controls and directs the interpretation of every section and sentence in the second part of the Code; and we see no reason for doubting that it is just as applicable to a simple repeal by which existing suits would otherwise be affected, as to new and positive enactments. Section 303 must therefore receive the same construction as if the words "except in relation to suits commenced on or before the 1st day of July, 1848," had immediately followed the words "are repealed."

It was insisted, however, by the learned counsel for the plaintiff, that although this suit may be saved from the sweeping repeal in § 303, still the costs which are recoverable are not regulated by the statutory provisions which were in force on the 1st July, 1848, but that there is another section in the Code which is applicable to this case, and, by a reference to

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which, the questions, which party is entitled to costs and the amount of those costs, must alone be determined.

The section upon which the counsel relied, is § 459, by which the provisions of the Code are made applicable to future proceedings in suits previously commenced in the following cases :

1. Where there has been no pleading, to the pleadings, and all subsequent proceedings.
2. Where there is an issue of law or of fact, or any other question of fact to be tried, to the trial and all subsequent proceedings.

3. After a judgment or order, to the proceedings to enforce, vacate, modify, or reverse it, including the costs of an appeal.

It is to the second class of these cases that this suit belongs, and the argument of the counsel was that the entry of judgment and the adjustment or taxation of costs are proceedings in the cause which necessarily involve the questions of the right to costs, and their amount, and that, as these proceedings are governed by the Code, it is only by its provisions that the questions which they involve can be determined; and, upon this ground, he contended that the right of the plaintiff to recover the costs, which the Code gives, is exactly the same as if the suit had not been commenced at all until the Code was enacted.

It is evident that the argument of the counsel proceeded entirely upon the force which he attributed to the term "proceeding," and it would be unanswerable, could we assent to the interpretation that he wished us to adopt; but we cannot assent to it. The word "proceeding," both in its popular use and in its technical application, has a definite meaning, which we cannot alter or enlarge. It means, in all cases, the performance of an act, and is wholly distinct from any consideration of an abstract right. A proceeding in a civil action is an act necessary to be done in order to attain a given end. It is a prescribed mode of action for carrying into effect a legal right, and so far from involving any consideration or determination of the right, presupposes its existence: the proceeding follows the right. The rules by which proceedings are governed, are rules of procedure; those by which rights are established and defined, rules

of law. It is the law which gives a right to costs and fixes their amount. It is procedure which declares when and by whom the costs, to which a party has a previous title, shall be adjusted or taxed, and when, and by whose direction, a judgment in his favor shall be entered.

The sense of the legislature that the word "proceeding" does not *ex vi termini* include costs, is clearly shown by the addition in the third subdivision of the section, of the words "including the costs of an appeal;" the addition was made because it was believed to be necessary—because without it the costs of an appeal would not have been covered. There would have been a similar addition in relation to the costs of the suit, in the second subdivision, had that subdivision been intended to include them; the omission proves that they were meant to be excluded; *Expressio unius exclusio alterius*.

We are, therefore, clearly of opinion, that the right of the defendants to costs is not at all affected by the provisions of the Code, but depends entirely upon the statutory provisions that were in force when the Code was adopted. When the jury rendered their verdict for the plaintiff for \$50 only, the counsel for the defendants might have moved for an entry of judgment in his favor, and had the application then been made, we doubt not that the necessary direction would have been given, but no such direction was then given, or has since been obtained; there is no order of the court, or of a judge, upon which the judgment as entered was founded. It is true that the clerk, when the verdict was rendered, in the exercise of the power given to him by § 249 of the Code, as amended in April, 1852, might have entered judgment in favor of the defendant for his costs, but it does not appear that any such entry was then, or has since been made. Hence the proceedings of the defendant's attorney in perfecting a judgment in the manner he has done, were plainly unauthorized and irregular. They are so in our judgment, even if tested by the rules of practice that formerly prevailed (3 Wend. 308; 12 Id. 216); they are *a fortiori* under the Code, by the provisions of which it appears to be certain that they ought to have been regulated.

The motion to set aside the judgment as irregular is there-

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fore granted, with \$10 costs, but we cannot direct an adjustment of the costs in favor of the plaintiff. For the reasons that have been given, he has no title to the costs which he claims, and whether he has lost them by the deficiency of the proof, or a mistake of the jury, we have no power to relieve him.

Upon a subsequent application, made by the defendant at chambers, the clerk was directed to enter judgment in favor of the defendant for his costs, and the plaintiff's verdict for \$50, and \$20 costs, which the defendant, upon former motions, had been ordered to pay, were directed to be offset.

The decision was made by Bosworth, J., and approved by the other judges.

BACON v. READING.

APPEAL FROM AN ORDER.—STAY OF PROCEEDINGS.

Although no security is required upon an appeal from an order, yet such an appeal does not operate as a stay of proceedings—when a stay is desired, until the determination of the appeal, it must be obtained by a special order.

(Before OAKLEY, Ch. J. Nov. 1852.)

In this case a motion for a new trial, upon the ground that the verdict was against evidence, had been denied at special term, and the defendant appealed from the order to the general term. After notice of the appeal had been given, the plaintiff entered judgment upon the verdict, a stay of proceedings, which had been granted when the case was made, having ceased, by the terms of the order, upon the refusal of a new trial. The counsel for the defendant moved, at chambers, to set aside the judgment as irregular.

OAKLEY, C. J.—I have consulted with my brethren and we are all of opinion that, although no security is requisite to be

given upon an appeal from an order, according to our decision in *Allen v. Johnson*, 2 Sand. S. C. R. 629, it is a mistake to suppose that because the appeal without security is valid, it can operate *per se* as a stay of proceedings; nor is there a single word in our former decision to warrant such a conclusion. When a stay of proceedings, until the determination of an appeal from an order, is desired, it must be obtained by a special order, and regularly, the application for that purpose ought to be made to the judge by whom the original motion was decided.

The 349th section of the Code of 1851 specifies an order granting or refusing a new trial as one of those from which an appeal may be taken; but we cannot apply to such an appeal a different rule from that which has invariably been followed in relation to every other class of orders which the section enumerates. It has certainly never been supposed that an appeal from an order dissolving an injunction, or discharging a defendant from arrest, *proprio vigore*, revives the injunction or continues the imprisonment; but if such is not the effect of an appeal in these cases, I cannot say that in any other it suspends the execution of the order, or the performance of any act, which is its legal consequence. If it cannot restore a dissolved injunction, it cannot revive a stay of proceedings that ceased when the order was made. It follows that the plaintiff, in entering his judgment, was entirely regular.

It is true that the motion to set aside the judgment is, in a measure, countenanced by the case of *Emerson v. Burney*, 6 How. Prac. R. 32, but the observations of the learned judge in that case do not appear to be sustained by the authorities, and are plainly repugnant to the established practice in chancery in relation to appeals from interlocutory orders.

The motion to set aside the judgment is denied, but without costs, and I think it reasonable to grant a stay of execution upon the judgment until the determination of the appeal.

Forrester v. Wilson.

FORRESTER v. WILSON.

The court will relieve a tenant, upon equitable terms, against whom a judgment of dispossession, under the act authorising summary proceedings to recover the possession of land, had been obtained by surprise. In such a case an injunction restraining the landlord from executing a warrant of dispossession will be granted upon the payment into court, by the tenant, of the rent claimed to be due.

Nov. 20, 1852.

THIS case came before the Chief Justice, at chambers, upon a motion to show cause why an injunction should not issue restraining the defendant from executing, as landlord, a warrant of dispossession against the plaintiff, as tenant, for the non-payment of a quarter's rent. The ground of the application was, that the judgment upon which the warrant was grounded, had been obtained by surprise, and that the plaintiff had an equitable set-off to the demand for rent; the plaintiff, however, offered to pay into court all the rent that was claimed to be due.

The Chief Justice, after consultation with the other judges, granted the injunction as prayed for, upon the condition of the immediate payment of the rent as claimed by the defendant.

The ground of the decision was, that as the magistrate, by the issuing of the warrant, was *functus officio*, the plaintiff, unless by the interposition of a court of equity, would be remediless.

C. A. Burling, for plaintiff.

H. P. Fessenden, for defendant.

Vide *Capet v. Parker*, 3 Sand. S. O. R. 662; *Moffat v. Smith*, 1 Barb. Sup. O. R. 65.

Upon appeal this decision was affirmed at general term.

Burdell v. Burdell.

BURDELL, ADMINISTRATOR, v. BURDELL

Where a deposition taken *de bene esse* is not filed within ten days, as directed by the statute, the court may order it to be filed *nunc pro tunc*.
(At Special Term, Nov. 1852.)

JAMES BURDELL was examined on the 1st of July, 1852, *de bene esse*, as a witness on the part of the plaintiff, pursuant to 2 R. S. § 392. Defendant's attorney was duly served with the order for, and attended at such examination and cross-examined the witness. When the deposition was concluded and certified, plaintiff's attorney handed it to his clerk, directed him to make a copy of it, file the original within the ten days, and serve notice on defendant's attorney that it was so filed. The clerk copied it, and, on the 10th of July, by mistake, filed with the clerk of the court the copy instead of the original, and gave notice to defendant's attorney that the original was duly filed. On the 17th instant the mistake was first discovered.

Plaintiff's attorney, on an order to show cause, and on affidavits showing these facts, and that the witness resides in Michigan, and is now absent from the State, moves for an order directing the deposition to be filed now, as of the 10th of July, 1852. The motion is opposed on the ground that filing of it within the ten days is a statutory pre-requisite to its admissibility as evidence; that, not having been so filed, it is not a deposition, and that the court has no power, by ordering it filed *nunc pro tunc*, to make it evidence. That the statute must be literally and strictly complied with, or the whole proceeding is a nullity. That the court has no power to dispense with a condition imposed by statute.

S. Sanzay, for plaintiff.

A. F. Smith, for defendant.

BOSWORTH, J.—All the proceedings preliminary to the taking of the deposition conform strictly to the provisions of the statute. The defendant's attorney was present upon the exami-

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nation of the witness, and cross-examined him. It was certified by the officer before whom the examination was had, on the day the examination took place. Within ten days thereafter, a copy of the deposition was (by mistake) filed instead of the original. At the earliest moment after the mistake was discovered, the plaintiff moves the court for an order directing it to be filed *nunc pro tunc*. It is clear that the order should be granted, unless the filing of the deposition within ten days after it was taken is made, by statute, an indispensable condition to its admissibility as evidence.

I do not think the statute necessarily requires such a construction. The 5th section prescribes how the examination shall be conducted. Section 6th declares that, "such deposition" shall be read to and subscribed by the witness, shall be certified by the officer taking the same, "and, within ten days thereafter, shall be filed in the office of the clerk of the court in which such action shall be depending."

The words "such deposition," as used in § 6, mean the unfiled and uncertified deposition spoken of in § 5. Section 7 declares that "such deposition" or a certified copy of it, may be given in evidence on the trial by either party. The words "such deposition," as used in § 7, evidently contemplate a deposition certified and filed, but do they necessarily mean that it cannot be read unless it has been filed within the ten days?

No provision is made for its custody during the ten days. The right is given to either party to read it on the trial; unless the provision that it must be filed in ten days can be regarded as directory merely, then it will be in the power of the party at whose instance it is taken, if the testimony is unfavorable to him, to deprive the other party of all benefit from it, by omitting to file it within the ten days.

A construction involving such consequences, should not be given unless imperatively required. Section 6th is evidently designed as much for the benefit of the opposite party, as of the one at whose instance the deposition is taken.

Section 8 specifies what facts, on being satisfactorily proved, will prevent the reading of the deposition. An omission to file it within the ten days is not one of the enumerated objections.

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Prior to the adoption of the Code, there were but four clerks of the Supreme Court. If a witness had been duly examined *de bene esse*, so short a period before the circuit that there was not time to file it with a clerk of the court before the cause was reached, and, in the mean time, the witness had died, could it be read on the trial, or would it be necessary to put the cause over the circuit that it might be filed, to entitle the party taking it to have it read? I do not think that the statute imposes such a condition as a right to read the deposition in evidence.

This case is distinguishable from *Jackson, ex dem. v. Hobby*, 20 J. R. 357, and *Richardson v. Gere*, 21 Wend. 156.

Jackson v. Hobby presented the question whether the deposition of a witness taken by virtue of a commission under 1 R. S. 519-520, § 11, could be read before it had been filed with the clerk of the court, and it was held that it could not. That statute provided, that when the commission and deposition were sent by an agent, he "should deliver the same to one of the judges of the court," who was required, after taking the affidavit of the agent, "to deposit the said commission and return with the said affidavit in the office of the clerk of the said court."

The section further provided that "every such deposition, being so taken and returned, shall be allowed and read," &c.

The court held, that the words "being so returned" could not be satisfied with anything less than an actual filing of the deposition by the officer, and in the manner prescribed; that the judge was made one of the officers for completing the return; and that, in legal and common parlance, a commission was not returned until deposited in the office in which it was returnable.

But § 7 of 2 R. S. 392, contains no such words. It does not say that such deposition, on "being so filed," may be read. It directs it to be filed, and allows the party ten days, as a matter of course, in which to file it, but does not say that he shall not be permitted to read it, and does not seem to contemplate that he may defeat the right of the opposite party to read it, by failing to file it within the ten days.

Richardson v. Gere presented the question whether a deposition taken by commission under 2 R. S. § 393, § 11-31, which

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had been actually filed, could be read. The officer who allowed the interrogatories did not direct upon the commission "in what manner" it should be returned, which § 23 requires to be done. He directed it to be returned to the clerk of Tompkins Co., but omitted to direct in what manner. It was returned to him by mail. He took it from the post-office and filed it. Nelson, Ch. J., said, "Without the direction provided for by the act, I do not see how a return can be legally made at all; for, in the absence of it, there is no mode recognised by the law. The commission would be nugatory in this respect. But it is clear that the return by mail is admissible only by the permission of the officer in the exercise of his discretion."

Section 31 provides that "the examinations and depositions taken under a commission issued, executed, and returned, as herein directed," may be used in evidence, &c. This was not returned as directed, for no direction had been given as to the manner of returning it. The statute required such direction to be given on the commission itself. This, necessarily, must be done before the witnesses are examined.

I do not think that either of those cases decides any principle applicable to this.

Even if it was apparent that the statute imposed, as a condition to the right to read a deposition, that it should be filed within ten days after it was taken, it is by no means clear that the Code has not conferred on the court ample power to grant the relief sought.

Section 174 declares that the court, in its discretion, "may supply an omission in any proceeding." The obvious meaning of this phrase is, that the court may supply any omission in any proceeding which, by law, may be taken in the progress of an action. The previous part of the section gave power to allow "any act to be done after the time limited by the Code," and the section is made applicable to pre-existing suits. (Act of June 11, 1849, § 2, sub. 1.) Hence, if this suit had been commenced prior to the Code, the authority to grant the relief sought would seem to be unquestionable. The section having given the fullest power in respect to proceedings regulated by the Code, and the same power over pending suits, and it being possible that, in new suits, there might be a failure to conform

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proceedings, regulated entirely by the Revised Statutes, to all the requirements of such statutes, further power was given, in the most comprehensive terms, to "supply an omission in any proceeding" which might be required to promote the ends of justice.

The filing of a copy instead of the deposition itself is a mere omission of a thing which the statute directed to be done. It occurred by mistake, and contrary to the intent of the plaintiff's attorney. The filing of it now, instead of on the 10th of July, and as of that date, can do no possible harm to the defendant. It is but doing what he was notified at the time had then been done, and what, for aught that appears, he supposed had been done, until the plaintiff's attorney informed him of the discovery of the mistake.

I am of the opinion that the court may order the deposition to be filed now, as of the 10th of July, 1852; and that, on being so filed, it will be as available to either party as if it had been actually filed on that day. An order to that effect may be entered.

This opinion was read to and approved by all the judges.

JEROLIMAN and another v. COHEN.

An order directing a complaint to be amended in certain particulars does not preclude the plaintiff from serving an amended complaint, containing new and material allegations, provided the time for amending, as of course, has not expired.

The complaint, however, so amended, must not contain any matter that by the prior order was directed to be stricken out.

But *semble* that, when an amended complaint has been served in conformity to an order, it cannot be again amended without leave of the court, although the time for amending, as of course, may not have expired.

A complaint seeking damages for the breach of an agreement, may also require, that an agreement in writing, relating to the same transaction, which the plaintiff was induced to sign by fraud, may be reformed, so as to correspond with the agreement set forth, of which the breach is alleged.

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It is no objection, that the reformation of a written contract is a matter purely of equitable cognizance, since, under § 169 of the Code, as last amended, legal and equitable causes of action, when they arise out of the same transaction, may be united.

THE summons and complaint were served on the 12th of May, 1852. On the 26th of June, an order was made on defendant's motion, and after hearing counsel for both parties, which directed that specific parts of the complaint be stricken out, as "irrelevant and redundant," and that other certain parts be made more definite and certain; and denied so much of defendant's motion as asked to have certain other portions stricken out, and still other portions made more definite and certain. The order of the 26th of June specified no time within which the plaintiffs were to make their complaint more definite and certain.

On the first of November, the plaintiffs served an amended complaint, which contains most of the matter directed by the order of June 26th, to be stricken from the original complaint. In addition to stating the contract as it was set out in the original complaint, it alleges that a written agreement was executed, from which material promises on the part of defendant were omitted; and avers that the plaintiffs were induced by the fraud of the defendant to execute it in that form; and prays among other things, in addition to the relief as first prayed, that defendant may be held to the same liability that would exist, if the promises alleged to have been omitted, were in fact contained in the written agreement that was executed by the parties.

The defendant now moves to set aside the amended complaint for irregularity, on the grounds that it was not served in time, and contains matter ordered to be stricken from the original complaint, and that, under the form of an amended complaint, a new complaint on a different cause of action has been introduced.

S. H. B. Judah, for defendant.

Chas. P. Kirkland, for plaintiffs.

BOSWORTH, J.—(All the judges having been consulted, and

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assenting to the decision made.) Is the amended complaint irregular, solely on the ground that it was not served in time? A complaint may be once amended by the party of course, at any time before the period for answering it expires (Code, § 172), or at any time within twenty days after the service of an answer or demurrer.

The time for answering the complaint has not expired. The defendant is entitled to twenty days in which to answer it after it shall have been made more definite and certain, as directed by the order of the 26th of June.

That order does not preclude the plaintiff from making an amendment in other respects than those specified in it. Within the time allowed by the practice of the court to comply with the order, the plaintiffs, in addition to obeying the order, might amend the complaint as to any other matters, if the amendments were such as are allowable on amending, as a matter of course. Twenty days is the period fixed by rule 35 (38 of former rules), for performing the directions contained in the order. It was not obeyed within that time. Still the plaintiffs were bound to obey it, and obedience to it could have been compelled. (Code, § 132.)

Can it justly be said, that after the twenty days expired, the plaintiffs had no right to otherwise amend, than as prescribed by the order? Unless this question must be answered affirmatively, then it was their privilege to make any proper amendments in addition to those required by the order.

On serving an amended complaint, complying with the order, the defendant would have twenty days to answer it, and within that time, the plaintiffs could amend, as a matter of course, unless the right to do so, was taken away by their having amended once in obedience to an order of the court. I am inclined to think that having amended once, although by order of the court, they could not amend again as a matter of course, and that it would be necessary for them in thus amending, to make all desired amendments, and that on failing to do so, they could not amend again except by leave of the court, under § 173.

If this view be correct, then the question recurs, can they amend as a matter of course, after twenty days from the service

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of an order requiring amendments of a particular character, otherwise than as the order directs? No objection is perceived to such a practice. I think it may fairly be said, that the time to answer the complaint does not expire until twenty days after an amended complaint shall be served. The plaintiff may amend in any proper manner, but in amending, he must comply with the directions of the order.

Can an amendment of the nature of the one made in this case, be made as a matter of course? If the plaintiffs had amended, under an order granted by the court, upon application made after the time to amend as of course had expired, the court might have allowed the plaintiffs to insert "other allegations material to the case." (Code, § 173, as last amended.)

I perceive no good reason why, on amending as a matter of course, the party may not make amendments of the same character.

The plaintiffs seek to recover for breaches of a contract set out in the original complaint.

In the amended complaint they claim to recover for the same breaches of an alleged contract of the same terms. But the amended complaint shows a written agreement signed by the parties, omitting some of the provisions of the contract as it is alleged to have been in fact made, and avers that the plaintiffs were induced to sign it, by the fraud of the defendant, and therefore claim the right to show the fraud, and that the contract was as it is averred to have been, and on proving this and the fraud, to recover for the breaches of the contract, as it is stated in both complaints to have been in fact made. These allegations are certainly material to the plaintiff's case. And if proof of the fraud will entitle them to show what the contract really was, and that it was as it is alleged to have been, then the amendment should be allowed.

The cause of action is substantially the making of such a contract as is set up, and the breaches of it alleged in the original and amended complaint. There is in reality, but one controversy, which it is desirable should be settled in a single action, and it cannot be necessary, before relief in form can be asked, to coerce a prior and independent suit to reform the written contract. Unless the fraud be proved, so that the written agreement ceases to be

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a barrier to proof of the contract, as it is averred to have been, the plaintiffs will fail in their action. Whether the matters alleged, properly constitute a single cause of action, or substantially separate causes of action, yet they all arise out of the same transaction, or transactions connected with the same subject of action. Such causes of action, where several exist, although, as in the present case, one may be legal and another equitable, may now be united in the same complaint. (Code, § 167, sub. 1, as last amended.)

I am of the opinion, that the nature of the new matter inserted is not such as to make the amended complaint irregular, for that cause. The motion must therefore be denied, but without prejudice to the plaintiff's right to move to strike out as irrelevant or redundant, any of the matter stricken from the original complaint, and re-inserted in the amended one.

DRUMMOND v. HUSSON.

The Code, as amended in 1852, has not substituted an order for a judgment in all cases where a demurrer is sustained or overruled.

The decision is still a judgment, where a demurrer to the whole pleading is sustained. It is an order where the demurrer is partial.

Upon an appeal from such an order only ten dollars costs can be given.

(Nov. 1852.)

THE court, at the General Term in October, had affirmed the decision of the judge at special term, overruling a demurrer to the defendant's answer. The demurrer, however, related only to a part of the answer, and it was overruled by an order and not by a judgment. On the settlement of the order or judgment of affirmance, a question arose as to the costs to be allowed to the defendant upon the appeal.

W. Watson, for plaintiff.

S. F. Clarkson, for defendant.

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BOSWORTH, J.—The second subdivision in § 349 of the Code as last amended, gives an appeal from an order, sustaining or overruling a demurrer, but I do not understand this provision as converting a decision upon a demurrer, in all cases, from a judgment into a mere order. When a demurrer is sustained which goes to the whole complaint or answer, the decision, as it determines that the party against whom it is given has no right of action or no defence, is in its nature a final judgment, and this is so even when liberty to amend is given, if the party fail to avail himself of the privilege within the limited time; but when the demurrer relates only to a part of a pleading, the decision sustaining or overruling it, may with great propriety be termed an order, since its only effect is to strike out or retain that part of the pleading to which the demurrer applies, leaving the other issues undetermined.

In this case the demurrer was only to a part of the answer, and consequently was properly described as an order, and being so, the question as to the costs to be allowed upon this appeal is free from difficulty.

The sixth subdivision in § 307 of the Code gives before argument \$15, and after argument \$30, upon an appeal from the special to the general terms, and contains only an exception of an appeal from an order granting or denying a non-enumerated motion. The defendant would have been entitled to the costs thus given, had the terms of the exception been unaltered, since by rule twenty-seven of this court, an appeal from a decision upon a demurrer, whether a judgment or an order, is in all cases an enumerated motion; but the exception as amended in 1852, now embraces appeals in all the cases mentioned in § 349 as amended, and it has already been stated that an appeal from an order sustaining or overruling a demurrer is one of those cases. The costs of the defendant must therefore be limited to \$10, which are all that we can give.

Approved, upon consultation, by all the judges.

Brown v. Bradshaw.

KING ET AL. v. TUSKA.

In proceedings supplementary to an execution, an order, restraining a third person from disposing of property of the debtor, cannot be made until such person has been made a party to the proceeding.

At Chambers, Nov. 15, 1852.

A motion was made for an injunction order restraining N. Ferris, assignee of Tuska, from disposing of assigned property.

BOSWORTH, J. (DUEB, J., concurred.)—It does not appear that any order has been made under § 294, requiring Ferris to appear and answer. This seems to be necessary in order to make him a party to the proceedings (5 How. P. R. 16), and to enable the court properly to enjoin him under § 299.

Section 294 seems to prescribe the proceedings to be taken, to authorize an order under § 299.

The affidavit does not affirm that Tuska has any interest, or had when the supplementary proceedings were commenced, in the property alleged to have been assigned to Ferris, nor when the assignment was made to him, whether before or since the 17th of May. The order asked for must be denied, but without prejudice to the right to apply for an injunction order under § 294.

BROWN AND ANOTHER v. BRADSHAW.

Where a cause involves the examination of a long account, it is no objection to a motion for a reference that it had once been tried by a jury.

November, 1852.

A NEW trial was granted in this case at the last October term, and the defendant, upon the ground that it involved the examination of a long account, now moved for a reference. It

Roy v. Thompson.

was objected that as the cause had once been tried by a jury, and no objection to the items of the account had then been made, the motion was too late. The judges, consulted by Emmet, J., were all of opinion that there was no force in the objection, since if the motion were denied it might be renewed upon the trial, and unless the account was then admitted, it would be the duty of the judge to grant it. Under the pleadings, the defendant had a right to require each item in the account to be proved, and he was not precluded from demanding this proof by the course on the former trial.

EMMET, J., accordingly granted the motion.

ROY v. THOMPSON.

A defendant may, in all cases, move for a dismissal of the complaint, where the plaintiff neglects to bring the cause to trial according to the course and practice of the court, without being himself bound to notice the cause for trial.

November, 1852.

It was held in this case, by Bosworth, Justice, with the concurrence of all the judges, that in order to entitle a defendant to move for a dismissal of the complaint, he was not bound himself to notice the cause for trial, but might make the motion, in all cases, where the plaintiff had neglected to bring the cause to trial, according to the course and practice of the court. The affidavit, however, upon which the motion is founded, must show that the cause was at issue in time to have been noticed, and that at the term for which it ought to have been noticed, younger issues had been tried.

But it is only a judgment of dismissal that can be founded upon such a motion. When a defendant claims affirmative relief, legal or equitable, the duty of an actor in bringing the cause to trial devolves upon him. He can only obtain the relief, when the cause is brought to a trial, upon his own notice, or that of the plaintiff. (*Vide* No. 21, of the rules of the Supreme Court, as last amended.)

Roy v. Harley.

ROY v. HARLEY AND OTHERS.

The appointment or nomination of a special attorney, under the act of 1847 (Chap. 470, § 46), must be approved and ratified by the court before the person so appointed or nominated can be authorized to act.

A person cannot be substituted as an attorney in the suit merely by filing the written consent of the first attorney, but, in all cases, an order of the court is necessary to render the substitution valid.

When these rules are violated, all acts and proceedings in the name of a person claiming to act as a special or substituted attorney, are irregular and void.

Upon these grounds, a judgment dismissing the complaint and other proceedings in the name of a person claiming to act for the defendant as a special and substituted attorney held to be irregular and set aside.

(At Special Term. BOSWORTH, J.)

December, 1852.

THE plaintiff moves to set aside for irregularity a judgment which has been entered, dismissing his complaint with costs.

When the action was commenced, the defendant Harley appeared and put in an answer by an attorney of this court. Issue was joined in February last, and the defendant's attorney acted as such, until September.

In September last, the defendant, by an instrument in writing, and under seal, appointed a person, not an attorney of this court, her attorney, in the place and stead of the one who had previously acted as such, "to do all, and singular, every act, matter, and thing, he may deem necessary to and for the purpose of defending" this suit on her behalf. The first attorney signed a written consent to the substitution of the other, in his place and stead, as the attorney of the defendant Harley.

These two papers were filed with the clerk of the court, on the 23d of September. A copy of the consent and notice of substitution were served on plaintiff's attorney. No order of substitution appears to have been in fact entered, nor was any application made to the court to permit the special attorney to appear in the suit, nor was any proof furnished to the court of the execution of the power of attorney by the defendant Harley.

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After the filing of this power of attorney and the consent to substitution, an order was obtained by the special attorney, that the plaintiff file security for costs, or show cause on the first of October, why security should not be filed, or his complaint be dismissed. On the first, an order was obtained directing such security to be filed on or before the 4th of October, or that the complaint be dismissed with costs. The latter order not having been complied with, a judgment was entered dismissing the complaint with costs. On the 7th of October, defendant's costs were inserted in the entry of judgment, a judgment roll was filed and execution issued. These proceedings were all taken by the substituted attorney, and in his name, as being the attorney of the defendant Harley in this action.

Since these proceedings were had, such attorney, as his affidavit states, has been admitted an attorney and counsellor of all the courts of this state.

These facts present the question, whether the judgment entered, and other proceedings had in the cause, by and in the name of the special attorney, are regular.

J. H. Harte, for plaintiff.

J. H. Sutherland, for defendant.

BOSWORTH, J. (on consultation with OAKLEY, C. J., and DUEB, CAMPBELL, and EMMET, Justices).—Prior to the present constitution and the judiciary act of 1847, no one could appear on the record or act, as the attorney of a party, in conducting the proceedings in a suit, unless he had been regularly admitted by the court to practise as an attorney of the court (2 R. S. 287).

On being admitted and taking the oath of office, he became an officer of the court. He acquired as such, various privileges, and incurred various liabilities, some of which are regulated by statute, and others by the settled practice of the courts.

The courts had the power to strike his name from the rolls and deprive him of his office for misconduct.

The courts also exercised the power of relieving a suitor summarily, against the misconduct of his attorney, instead of driving him to the expensive and dilatory remedy of an action.

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The law was settled, that where an attorney had been retained and acted for a party, another attorney could not act for such party until he had been substituted by a rule of court, and notice of such substitution had been served. If he undertook to act, without having been thus substituted, his proceedings would be disregarded (*Jerome v. Boeran*, 1 Wend. 293; *Same v. The People*, Graham Pr. 48-49).

The present constitution (art. 6, § 8) declares that "any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this state."

The revised statutes provided that "no person shall be admitted a counsellor, attorney, or solicitor in any court, unless he be approved by such court for his good character and learning" (2 R. S., 287, § 66).

The two provisions seem to be in the same spirit. The former was probably designed to deprive the courts of the power to prescribe any term of clerkship or study, as a condition to the right to an admission to practice. The requisite qualifications of learning and ability, and a good moral character, were made the only conditions. The constitution clearly implies that some tribunal must determine whether these exist in the applicant, and that the power of admission, and of refusing admission to practice, was to be vested at least in some one court. The 75th section of the Judiciary Act vested that power in the Supreme Court. That section provides that any person applying to be admitted, "shall be examined by the justices of the supreme court," that such "examination shall be at a general term thereof," and if the applicant "shall be found to be of good moral character, and to possess the requisite qualifications of learning and ability, the court shall direct an order to be entered by the clerk thereof, stating that such person has been so examined and found to possess the qualifications required by the constitution, and thereupon such person shall be entitled to practise as an attorney, solicitor, and counsellor in all courts in this state, until he shall be suspended from such practice, as hereinafter provided. * * * The Supreme Court organized by this act, shall possess the same power to remove or suspend

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an attorney, solicitor, and counsellor, as is now possessed by the present supreme court and court of chancery" (Laws of 1847, p. 342, § 75).

These provisions, while they abolish a prescribed term of study, seem designed to secure as high qualifications as had previously been required as conditions to admission, and to provide for a more thorough and responsible examination of applicants by directing that the examination shall be made by the justices of the Supreme Court, at a general term. It does not seem to have been any part of the purpose of the framers of the constitution, or of the Legislature, to affect the rights, duties, or liabilities of an attorney, or of the power of the court over them,—with this qualification, that to one court alone was confided the power of admitting, removing, or suspending an attorney.

The Legislature of 1847, at its second meeting, amended the judiciary act. Section 46 is in these words: "Any person of good moral character, although not admitted as an attorney, may manage, prosecute, or defend a suit for any person, provided he is specially authorized for that purpose by the party for whom he appears, in writing, or by personal nomination in open court." (Laws of 1847, vol. ii., p. 647, § 46.)

The defendant claims that her managing attorney, appointed by the written power of attorney, filed on the 23d of September, is authorized by this section to act for her, and that the proceedings conducted by him are regular.

In *Devries v. McKoan* (1 Code R., p. 6), it was decided at a special term of the Supreme Court for the first district, that this section was unconstitutional. The opinion pronounced states that it was unanimously concurred in by the other judges of the Supreme Court in that district. (3 Barb. S. C. R. 196.)

This motion can be disposed of without expressing any opinion on that question. Even if it be assumed that a person other than an "admitted attorney" may manage, prosecute, or defend a suit, if specially authorized in writing or by personal nomination in open court, and if of good moral character, yet the existence of these conditions must be satisfactorily established before he has a right to act, and before his acts can be recognised as valid. As a matter of necessity, they must be

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established to the satisfaction of the court in which the suit may be pending, or is to be brought.

If the managing attorney is to acquire his authority from a nomination of him by the party in open court, it will then be the duty of the court to determine whether he possesses the requisite of a good moral character. If his moral character is notoriously bad, or shall be satisfactorily shown to be so, it would be the duty of the court to refuse to permit such person to appear in the suit. Unless this is so, and unless the court has this power, then an attorney removed for official misconduct might re-appear the next day under a special power of attorney, and act as attorney and counsellor in defiance of the court which had removed him.

There should be some order of the court, to evidence the fact of its having permitted the person having a power of attorney, or who has been nominated in open court, to appear for the party for whom he proposes to act.

If the only evidence of authority to act is a written power of attorney, the execution of it should be proved. If an attorney has been previously retained, and has been acting as such, the newly appointed attorney should present his power of attorney to the court, duly acknowledged or proved, together with a consent of the former attorney to the substitution; and, if a stranger to the court, should also produce evidence of his good moral character, and apply for an order permitting him to be substituted and to act in the place and stead of the former attorney. When such an order has been entered, and notice of it has been served, he may proceed in the action, and his proceedings will then be regular, unless § 46 of chap. 470 of laws of 1847 is unconstitutional.

That the judgment may show on its face that the proceedings have been conducted by a person having authority to act for the party in court, so as to bind him by his acts, the order of substitution should be incorporated in the judgment roll. (Code, § 281, sub. 2; 12 Mod. 440; 1 Chit. Archb. 42.)

In this case, it is sufficient to say, that, after the defendant had appeared and answered by an attorney of the court, all notices and proceedings on her behalf in the name of another person as her attorney, who had not been authorized by an

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order of the court made in the action to appear and act for her, were entirely irregular. The judgment and execution must be set aside as irregular, but in this case it will be without costs.

ROOSEVELT v. BROWN.

Where a verdict is taken subject to the opinion of court at general term upon questions of law, and judgment in the meantime is suspended, if judgment is rendered upon the verdict, the prevailing party is not entitled to costs, as upon an appeal from a judgment at special term.

(Before all the judges.)

General Term, December, 1852.

At the trial, the jury were directed, if they should find certain questions of fact submitted to them in favor of the plaintiff, to render a verdict in his favor for the amount of his claim, subject to the opinion of the court at general term, upon certain questions of law also raised at the trial. They found a verdict for the plaintiff.

The plaintiff made a case, containing the pleadings, evidence, and questions of law raised at the trial. On argument of this case at the general term, the court ordered a judgment in favor of the plaintiff upon the verdict.

The plaintiff's bill of costs presented for adjustment contains these items, viz. :

Costs of appeal before argument	.	.	.	\$15
Costs of appeal for argument	.	.	.	30

The defendant objects to them, as unauthorized by the Code. The parties and clerk ask instructions from the court, upon the point whether they should be allowed.

By THE COURT. . Bosworth, J.—They cannot be allowed.

Bulkley v. Smith.

There has been no appeal, nor any judgment of the court from which an appeal could be taken, except that rendered by the general term.

At the trial, no decision was made upon any question of law. A verdict was ordered in favor of the plaintiff, if certain facts in issue were found to exist; but it was ordered to be given and was rendered subject to such judgment as the court at general term might give upon the questions of law.

These questions of law were first tried at and determined by the general term. The court at general term did not review the judgment of the judge at special term upon these questions, but they were there first decided.

The prevailing party can only be allowed, under § 307, sub. 3, p. 15, for the trial of the issues of law, besides such costs as he may be entitled to under sub. 7, and disbursements under § 311, unless the case be one which entitles the plaintiff to a percentage, as to which no opinion is expressed.

LUCIUS E. BULKLEY v. C. B. SMITH & JAMES H. BRUSH.

Where, in an action for a tort against several defendants, the jury have severed the damages, a judgment entered against all for the highest damages will not be set aside as irregular, but the defendants will be left to their remedy by appeal.

Dec. 11, 1852.

This was an action for a malicious prosecution, in which the defendants answered separately. The jury at the special term severed the damages, and rendered a verdict against the defendant Smith for twenty-five hundred dollars, and against Brush for five hundred dollars. The plaintiff, to cure this error in the verdict, entered the judgment against both defendants for twenty-five hundred dollars, and waived the five hundred dollars found against Brush. An allowance by way of costs had

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also been made of seventy-five dollars against Smith, and of twenty-five dollars against Brush; but the plaintiff had entered it in the judgment against the defendants jointly, for one hundred dollars.

The defendants obtained an order requiring the plaintiff to show cause why the judgment should not be set aside as irregular on both grounds, and insisted that the plaintiff should have elected to enter judgment against both defendants for five hundred dollars, or entered a *nol. pros.* as to Brush, and perfected his judgment for twenty-five hundred dollars against Smith alone.

Plaintiff in person.

Defendant in person.

OAKLEY, C. J., after consultation with the other judges.—Great doubt and much confusion in the authorities seems to exist in England and in this country as to the course to be pursued by the plaintiff in perfecting his judgment where the jury have severed the damages, as to the defendants in actions for torts, where the defendants are jointly found guilty. It is clear that in actions founded upon a tort which are in their nature joint and several, the plaintiff may cure a verdict wrong in point of law by entering a *nolle prosequi* against all the defendants but one, and taking judgment against him only. (1 Saunders, 207, v. 2; *Salmon v. Smith*, 6 T. R. 199, 200; *Mitchell v. Milbank and others*; *Sabin v. Long*, 1 Wils. 30; Sedg. on Damages, 584; and Cases Cited, 2d ed.) This practice seems to have been generally followed in this state; and we have not been referred to any case in our own courts where the practice adopted in this case has been followed. (*Holley v. Mix*, 3 Wend. 350; *Bohun v. Taylor*, 6 Cow. 313.)

But this practice of allowing the plaintiff, in cases where several damages are assessed, to enter judgment *de melioribus damnis* against all the defendants found guilty, was sanctioned in Haydon's case, 11 Coke, 5. (7 Viner's Abr. 303; *Elliott v. Anderson and others*, 1 C. B. 18; *Clark v. Newsam*, 1 Exch. R. 131; and 16 Law. J. Exch. 297.)

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The question is also directly decided in *Halsey v. Woodruff*, 9 Pick. R. 555, in a parallel case; and in *Rochester v. Anderson*, 1 Bibb. R. 434, where the defendants pleaded guilty, and it was held that if the jury sever the damages the plaintiff may take judgment against all for the best damages; while, in *Ammonett v. Harris and Turpin*, 1 How. & Mann. 488, the Maryland Court of Appeals held that the true mode of curing the error in the verdict was to enter a *nol. pros.* against all but one defendant.

In this conflict of the authorities, we have concluded that we will not interfere with the verdict on a motion like the present. As the error, if there is any, appears distinctly upon the record, and the plaintiff insists upon retaining the judgment in its present form, we think that the defendant must present the question by appeal.

The plaintiff certainly erred in incorporating in the record an allowance of one hundred dollars by way of costs, and in that respect the taxation must be modified.

The motion upon the principal point is denied, without costs and without prejudice.

WILMERDING AND OTHERS v. MOON impleaded with LEVY.

A defendant who has been arrested under an order in an action upon contract, and has not been bailed, may move to vacate the order at any time, before he has been charged in execution.

At Chambers, December 8th, 1852. Before OAKLEY, Chief Justice. (DUEB, CAMPBELL, BOSWORTH, and EMMET, J.J. concurred.)—The defendant Moon moved to vacate the order under which he had been arrested, upon affidavits controverting those upon which the order had been granted. The action was upon contract, and it appeared that the plaintiffs had obtained a judgment and had issued an execution against the property of the defendant, and these facts were relied on as a bar to the motion. The application was also resisted upon the merits.

Wilmerding v. Moon.

OAKLEY, CHIEF JUSTICE.—I have consulted my brethren upon the preliminary objection raised upon the argument, and we are all of opinion that I am bound to entertain this motion and decide it upon its merits, as disclosed by the affidavits. The facts upon which the plaintiff's counsel relied, in our judgment, are no bar to the application.

The only limitation of time which the Code imposes, is that which is necessarily implied in section 204, namely, that the motion to vacate an order of arrest must be made before the justification of bail, and with a single exception, that I shall hereafter state, we think, it follows that so long as bail may be put in, the right to make the motion is unimpaired.

It is true that in *Lewis v. Truesdell* (3 Sand. 706), in which we held that the motion was too late, the bail had not justified, but their undertaking had become absolute by the omission of the plaintiff to except, and the ground of our decision was that it is the perfecting of bail—whether by their justification or the absence of an exception is immaterial—that creates the estoppel. Although not within the letter, the case was plainly within the spirit and intention of the Code.

The perfecting of bail is an admission upon record that the order of arrest was justly made, but we cannot say that mere delay of the application to vacate the order is a conclusive admission of the same fact. An objection founded merely upon delay is in all cases addressed to the discretion of the court, and it would be a palpable abuse of that discretion to allow the objection to prevail, where the question is, whether a defendant shall be discharged from an unjust imprisonment.

Nor is the case at all altered by the facts that the plaintiff has obtained judgment and has issued execution against the property of the defendant. Where the right to arrest a defendant depends upon the nature of the action, and the facts constituting the right are set forth in the complaint,—as in actions for false imprisonment, malicious prosecution, breach of promise of marriage, &c.,—as the judgment establishes the truth of the facts it concludes the defendant from subsequently denying them, but when the order of arrest, as in this case, is founded solely upon extrinsic facts, not constituting the cause of action, as the judgment is no evidence of the truth of the facts, it

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leaves them just as open to explanation and denial as if it had never been obtained. The judgment is evidence that a debt is due to the plaintiff, but not that the defendant had been guilty of any fraud in contracting the debt, or endeavoring to evade its payment.

Whether I could entertain this motion if the defendant were now in confinement under an execution against his person, is not a question that can now be properly considered, but our decision is that an order of arrest founded upon extrinsic facts, may be vacated upon a proper application, at any time before the defendant, if not bailed, has been charged in execution. I have examined with attention the affidavits on both sides, and am satisfied that the defendant ought to be discharged.

Order of arrest vacated without costs.

WEST v. BREWSTER.

Where the action is against an attorney for an account of moneys collected by him, the proper notice to be inserted in the summons is that prescribed by subdivision 2 in § 129 of the Code.

The complaint in such a case need not state the particulars of the account, nor is the plaintiff bound to furnish a bill of particulars unless under a special order.

At Chambers, December, 1852. This was a motion in the alternative that all proceedings should be quashed as irregular, or that the complaint should be made more definite and certain. The notice inserted in the summons was in the terms of subdivision 2, § 129 of the Code, that if the defendant should fail to answer the complaint within, &c., the plaintiff would apply to the court for the relief demanded.

The complaint stated in general terms that the defendant had been retained by the plaintiff as his attorney in various suits and transactions, and averred, upon information and belief, that, as such attorney, he had collected for the plaintiff from divers

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persons divers sums of money, amounting to \$6,000, which he had neglected and refused to pay over, and prayed for an account of the moneys so received by him, and judgment for such sum as might be found due.

The defendant, in person, insisted that the action was an action arising upon contract for the recovery of money only, "and consequently that the notice in the summons should have been that the plaintiff would take judgment for a sum specified, in the language of sub. 1, § 129 of the Code. He also insisted that if the summons was regular, the complaint was too general and indefinite, and ought to be rendered definite and certain by requiring the plaintiff to specify therein the particular suits in which he, the defendant, had been retained, the names of the persons from whom he had made collections, and the sums of money received from each.

————— contra.

OAKLEY, C. J.—This is not an action "arising on a contract for the recovery of money only," within the meaning of sub. 1 in § 129 of the Code. The actions there referred to are actions at law, properly so called, in which, from the nature of the contract, the plaintiff knows, and can, therefore, specify the sum which he is entitled to recover. This is a suit in equity, arising from the particular relation of the parties; the contract which that relation implies is not for the payment of money only, and the relief which is sought, the compelling a confidential agent to render a proper account of the execution of his trust, is that which courts of equity alone have been accustomed to grant. The notice in the summons is, therefore, properly adapted to the relief demanded.

Nor do I see any necessity for requiring the plaintiff to render the complaint more definite and certain than it is. Even when the action is founded upon an account, the particulars of which are certainly known to the plaintiff, and where a certain sum, as a balance, is claimed to be due, the items of the account need not be set forth in the complaint, although, in such a case, a copy of the account, if demanded, must be delivered to the adverse party (Code, § 158). But this is not such an action.

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It is not founded upon an account in the possession of the plaintiff, but it exacts from the defendant an account which, if the general allegations in the complaint are true, he is bound to furnish, and all the particulars of which must be within his personal knowledge, and this account is required as a necessary preliminary to the judgment demanded. If, in a suit like this, a bill of particulars of the plaintiff's claim can, with any propriety, be required at all, before a reference to take an account is ordered, I am clearly of opinion that it can only be obtained under a special order of the court, founded upon an application showing its necessity.

The motion, in both its branches, is denied, with costs.

Approved at a consultation, by all the judges.

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A motion to strike out an entire answer as frivolous is irregular. The proper motion is for judgment under § 247 of the Code. Under the former practice sham and frivolous answers were frequently confounded, but they are carefully distinguished by the Code. The distinction is that which is stated in *Brown v. Jenison* (8 Sand. S. C. R. 732).

When one only of two or more defences in an answer is alleged to be frivolous, if it is also irrelevant or redundant, it may be struck out under § 160; but when it is merely frivolous the plaintiff is put to his demurrer.

December, 1852. This was a motion to strike out an answer as frivolous. The action was upon a promissory note by the payee against the maker; the complaint was in the usual form, but the answer merely denied upon information and belief that the plaintiff was the "lawful holder and owner of the note." The plaintiff had noticed the cause for trial at two or three successive terms after the service of the answer, and upon this ground it was insisted that the motion was too late.

Ridgeway, for plaintiff.

Scott, for defendant.

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OAKLEY, C. J. (DUEB, CAMPBELL, BOSWORTH, and EMMET, Justices, concurred.)—It is not necessary now to determine whether a motion of this kind can properly be entertained after the plaintiff has noticed the cause for trial, since upon another ground the motion, in its present form, must be denied.

When the entire answer is alleged to be frivolous, it cannot be stricken out under sections 152 or 160 of the Code, but the proper motion is under section 247, for a final judgment. Such a motion is a substitute for a demurrer, and raises substantially the same question; although, as we have frequently said, the motion will not be granted, unless the issue taken by the answer is plainly immaterial, or the defence set up manifestly groundless. Still as the judgment given, even where such is the opinion of the judge or court, may be erroneous, the defendant has the same right to have it reviewed upon an appeal, as if given upon a demurrer, and consequently, to enable him to exercise this right, the answer, instead of being stricken out, must remain upon the record.

According to the practice that prevailed before the Code, a frivolous as well as a sham plea might be stricken out upon motion; but a frivolous plea was then understood to mean not simply a plea bad upon its face, but one which, in the opinion of the court had been certainly interposed in bad faith, for the mere purpose of delay. Hence sham and frivolous pleas were frequently confounded, and indeed the term sham was indiscriminately applied to both. But the Code has carefully distinguished sham and frivolous answers, and has restored the words to their original and appropriate sense. The distinction between them is that which was stated by Mr. Justice DUEB, with the assent of the court, in *Brown v. Jenison* (3 Sand. 732). A sham answer is good upon its face, but false in fact; a frivolous answer denies no material averment in the complaint, and sets up no defence.

It is true, it is said in *Brown v. Jenison*, that a frivolous answer may be stricken out upon notice, but this we are satisfied is not correct where the objection applies to the entire answer. Where one only of two or more defences is frivolous, if it is also irrelevant or redundant, as will generally be the case, it may

— v. —

be stricken out under § 160; but when it is simply frivolous, the plaintiff will be obliged to demur.

The motion is denied without costs.

— v. —

Term fees not allowed for subsequent terms after a cause has been referred.

(OAKLEY, Ch. J., CAMPBELL, BOSWORTH and EMMET, J.J.)

General Term, Dec. 18, 1852.

BY THE COURT. BOSWORTH, J.—Is the prevailing party in an action which has been referred, entitled to recover a term fee of \$10 for every term of the court which intervenes between the date of the order of reference, and the filing of the referee's report?

After it has been referred, it is not only not necessarily on the calendar, but cannot properly be on it at all. Costs therefore cannot be allowed under § 307, Sub. 8.

For the trial of the issues before the referee, sub. 4 prescribes the costs to be allowed.

Referees have the same power as the court, to impose the payment of costs as a condition to granting a postponement of the trial (§ 314). It is to be presumed that the referee in this case discreetly exercised this power, in granting adjournments from time to time. At all events, no complaint is made that it was not so exercised in this case.

If the cause was difficult or extraordinary, or the prosecution or defence of it was unreasonably or unfairly conducted, a percentage may be allowed on the sum recovered, or claimed (§§ 308, 309).

But no costs can be allowed for the terms that elapse between ordering and closing the reference, for the reason that none are given by law. No costs are allowed for the term at which a cause is tried, for or on account of its having been on the calendar that term (§ 307, Sub. 8). The only costs allowed for

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that term, excepting disbursements, are costs for "the trial" of the action. Whether the trial takes two days or two terms, the compensation under § 307 is the same.

If any additional costs are recovered, they must be obtained through an allowance by way of a per centage—under sections 308 and 309.

HOYT v. THE AMERICAN EXCHANGE BANK.

The provisions of the Revised Statutes in relation to a discovery of books, papers, &c., have not been superseded by § 388 [sec. 341 and 342] of the Code. The two systems may stand together, as not being inconsistent with each other, either as to the mode of making a discovery, or the powers of the court, if a discovery be refused.

If in answer to an order for discovery and inspection, or for sworn copies of books, papers, &c., the opposite party denies fully and explicitly that there are any such entries, books, or papers under his control, that is an end of the application. He cannot be subjected to a fishing examination.

The court has no right, under the rules adopted, to execute the power conferred by the Revised Statutes, or under the Code, to direct a discovery to be made by appointing a referee to ascertain and report, whether an order directing a discovery previously made and executed, has been fully complied with; and that the referee have power to examine and personally inspect all the books, papers, and documents, &c., and to examine witnesses in relation thereto, &c.

On the return being made to the first order, the petitioner, if he deems it insufficient, should apply for an order that the opposite party show cause at a certain time why the particular deficiencies or omissions alleged should not be supplied.

The mode of making applications for discovery, &c., under the Revised Statutes and the Code, stated.

General Term, Jan. 1853. OAKLEY, Ch. J., PAINE, CAMPBELL, and BOSWORTH, J.J.—By an order at special term of the 10th January, 1853, the defendants were required to give to the plaintiff, within twenty days, &c., "sworn copies of all entries contained in any books, and of all papers and documents in their possession, or under their control, in reference to, or showing when, under what circumstances, for what purpose or con-

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sideration, and by or from what person or persons, a post note and some Indiana bonds, particularly described, were transferred, or delivered to, or into the possession of the defendants," and directing that such copies be sworn to by the defendants' cashier. The cashier was designated as the officer to verify the papers, at the instance of the plaintiff.

Copies of various entries and papers were furnished as a compliance with this order, and the cashier by affidavit deposed, that the papers so furnished were correct copies of all entries contained in any books of the said defendants, and of all papers and documents in their possession or under their control, in reference to or showing when, &c., following the terms of the order; "that diligent search has been made by this deponent for all entries in the books of the said defendants, and for the papers and documents referred to in the order above mentioned."

On the coming in of this return, plaintiff's attorney, on an affidavit that the return, in his judgment and belief, was an "evasion of said order of discovery, and a total failure to comply with the true intent and meaning of the same," and on the original papers, the return and such affidavit, moved for a more full and perfect discovery.

On such motion, the order appealed from was finally entered on the 9th of April, 1853. That order referred it to a "referee, to ascertain and report whether the said defendants have made the discovery required by the said order of the 10th of January last, and whether any and what further discovery should be made by them under the said order, and to that end to examine and inspect personally, all the books, papers, and documents now in their possession or under their control, containing entries or statements in reference to the discovery ordered and required by the said order of 10th of January last, or of which sworn copies should be given under the said order, and that the said referee have power to examine such witnesses as may be produced before him in relation to such books, papers, and documents, proving their existence or identity, and that he have power to cause such books, papers, and documents to be produced and exhibited to him, at the banking house of the said defendants for his personal examination, at such time as to him

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may seem proper, having regard to the business of the said defendants, that he may ascertain and determine whether the said defendants have by their said return complied with the said order of the 10th of January last, and made the discovery required thereby, or whether sworn copies of any entries therein should be furnished to the plaintiff in addition to such as may have already been furnished by said return; and the said defendants are hereby ordered to produce to the said referee, all such books, papers, and documents in their possession or under their control, as he may require on the said investigation."

From this order the defendants appealed to the general term.

The respondent insisted that it was a matter of discretion with the judge, whether he would order the reference or not, and that such an order was not appealable.

That a reference might be made "when a question of fact, other than upon the pleadings, shall arise upon motion or otherwise, in any stage of the action."

The appellants insisted that the return was a full and perfect compliance with the order of the 10th of January. That if the return was deemed or shown to be defective, a further return, and not a reference, should have been ordered; and that nothing was presented to the court, tending to show that the return made was not full and complete.

J. H. Titus, for appellants.

S. Sanxay, and *J. Hoyt*, in person, for respondent.

BY THE COURT. BOSWORTH, J.—Applications to compel a discovery, or that an inspection and copy of books, papers, and documents be given, are becoming quite numerous. It is important that the views which govern the action of the court in these proceedings should be distinctly stated, in order that the cases in which a discovery may be made, and the manner in which it will be ordered to be made, may be understood.

This court does not consider that the provisions of the Revised Statutes in relation to a discovery of books, papers, &c., have been superseded by § 388 [§§ 341 and 342] of the Code, but that the two systems may stand together, as not being in-

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consistent with each other, either as to the mode of making a discovery, or the powers of the court, if a discovery be refused.

If a party applies under the Revised Statutes, and makes a case provided for by them and the rules made under them, he has a right to a discovery. The court will exercise its discretion in specifying the manner in which it is to be made. In ordinary cases, and unless indispensable to protect the rights of the party applying, it will not order an inspection to be given, or a deposit to be made.

Sworn copies of books, entries, or of papers and documents, to the discovery of which the applicant shows a right, will be ordered to be furnished.

Enough must be stated to justify a presumption, that entries, papers or documents relating to a specified subject matter exist, are in possession or control of the other party, and that they will tend to establish some claim or defence of the party asking for the discovery; and that they are not in his possession or under his control (Rule 9, Supreme Court).

If in answer to the order, the opposite party denies fully and explicitly that there are any such entries, books or papers under his control, that is an end of the application.

He cannot be subjected to a fishing examination or investigation, with a view to ascertain the fact, whether he has or has not books, papers or documents which may contain evidence relating to the merits of the action, or of the defence, unless he is examined as a witness, so that his deposition may be made evidence as well for as against him (Code, § 389 [sec. 349]).

The Revised Statutes enacted that the Supreme Court, in prescribing, by general rules, the cases in which such discovery may be compelled and the proceedings for that purpose, where the statute had not regulated the same, should "be governed by the principles and practice of the Court of Chancery in compelling discovery, except that the costs of such proceedings shall be always awarded in the discretion of the court" (2 R. S. 199, § 31 [sec. 22]).

According to the practice of the Court of Chancery it was necessary to set forth in the bill the particulars of which the discovery was sought. The opposite party was not required to answer vague and loose surmises. An averment that the mat-

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ters, as to which a discovery was sought, were material to the defence, was not sufficient. It was requisite to so state the case, that the court could see how they might be material on the trial of the suit at law.

As soon as the answer was perfected the defendant might move for costs, and to dissolve any injunction that had been granted, staying proceedings at law until the discovery was made.

It was almost a matter of course to grant both motions, unless before the bill was filed he had been applied to for the discovery and had refused to make it, in which case costs were not allowed to him (2 Barb. Ch. Pr. 106, 111, 115).

The practice in case of applications under the Revised Statutes is deemed to be well settled (18 Wend. 529; 2 Sand. S. C. R. 662).

The applicant must state the particulars of which a discovery is sought, and enough to satisfy the court that it is in the power of the opposite party to furnish it, and that it is material for the support of the claim or defence of the applicant that it should be made.

If the party answer distinctly and unevasively, that as to all or any of the papers or documents or entries, of which a discovery is sought, there are no such papers or documents in his possession or under his control, and that there are no entries relating to the specified subject matter, or except such as he has furnished copies of, the applicant must abide by the answer so far as the proceedings for a discovery are concerned. If dissatisfied with the result of the proceedings, he must examine him as a witness, or rely on such other evidence as he may be able to command.

He has no right to have a general inquisitorial examination of all the books, papers, and documents of his adversary, with a view to ascertain if perchance something cannot be found which will possibly aid him.

The order appealed from appoints a referee to ascertain and report whether the order of January 10, 1853, has been fully complied with, and to that end purports to give him power "to examine and personally inspect all the books, papers, and documents" now or heretofore in the possession or under the

control of the defendants "containing entries or statements in reference to the discovery," and to examine witnesses in relation to such books, papers and documents, to prove their existence or identity, and to compel such books and papers to be produced and subjected to his personal examination.

We are satisfied that the court has no right, under the rules adopted, to execute the power conferred by the Revised Statutes or under the Code, to direct a discovery to be made in the manner directed by the order of the 9th of April, or such proceedings as are provided for in that order to ascertain whether an order directing a discovery has been fully complied with. If rules 8, 9, 10, and 11, are to be regarded as regulating the practice in applications under the Revised Statutes only, and as having no reference to proceedings under § 388 of the Code, then a discovery can be directed to be made in only one of the modes specified in rule 10.

The Code (§ 388) authorizes the court or a judge thereof, "in their discretion," to "order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy of any books, papers, and documents in his possession, or under his control, containing evidence relating to the merits of the action, or the defence therein."

Giving permission to take a copy, is necessarily giving power to inspect, as a copy cannot be made without inspecting the book, paper or document to be copied.

The only discretion which the court can exercise, under this section of the Code, is in determining whether it will order an inspection to be given at all. If it grants a discovery under this section, it has no discretion in directing the manner in which it is to be made. An inspection is to be given at all events, and the only alternatives that can be presented to the party against whom the motion is made are, to either give a copy or submit to the inconvenience of allowing the petitioner to make a copy.

If either party applies under the Code, he should be required to make a case as strong and urgent as is deemed necessary to entitle him to a production and deposit of books, papers and documents, instead of sworn copies. Neither reason, principle nor policy, demands that a party's books and papers, or any part

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of them, should be submitted to the inspection of his adversary, when the court would not order them to be deposited in order that they might be inspected. Such an order should be made only in those cases in which one for production and deposit would be granted, unless an inspection was ordered as a substitute for deposit, on the sole ground that a deposit and production would be a substantial inconvenience to the owner of the books, papers and documents, and would be of no benefit to the applicant beyond that which an inspection would confer.

Where the sworn copies furnished in obedience to an order for a discovery indicate that the discovery may not be complete, it is proper for the petitioner to apply for a further order based on the return and previous proceedings, or on them and further affidavits, for an order requiring the opposite party to show cause at a time to be named why sworn copies should not be furnished of such other entries, papers or documents relating to the points as to which a discovery had been ordered, as the return and other papers may induce the court to believe to be in his possession or control, and unless the possession or control of such papers and documents or the existence of such entries be explicitly and unequivocally denied, a peremptory order would be granted.

The return made in this case contains among other things four resolutions passed by the defendants on the 23d of March, 1840, the first two of which would seem to clearly relate to the Indiana bonds.

The third is as follows, viz: "Resolved, That S. Draper, Jun. and others' proposition be laid on the table." The immediately preceding and succeeding resolutions imply that the proposition related to the same bonds, and the natural inference would be that the proposition was in writing. It may be that the cashier, in the return sworn to by him, intended to have it distinctly understood that no such paper could be found, and it is possible that the thought of searching for one may not have occurred to him.

We think it would have been proper on the return being made, to have applied for an order that the defendants show cause at a time to be named why a sworn copy of that "proposition" should not be furnished. The order might also have included

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any other paper, document, book or entry, relating to the matter as to which a discovery had been ordered, whose existence was shown to be probable. In answer to the order to show cause, it would be incumbent on the defendants to show by the oaths of their proper officers, that no such paper, document or entry existed, or if the existence of either was not denied, the defendants would be ordered to furnish copies, or to submit to the consequences of disobedience.

We think this course should have been pursued instead of making the order appealed from. The proceedings authorized by the order, we do not think warranted by the rules adopted by the Supreme Court, or by the Code, and that the order appealed from should be reversed, without prejudice to the right of the plaintiff to apply for an order to show cause, in accordance with the views we have expressed.

We think it proper that the return should be verified as well by the president as by the cashier.

MURPHY, ADMINISTRATRIX OF MURPHY, v. KIPP & BROWN.

In an action under the statute, by the representatives of a deceased person, deprived of life through the alleged negligence of the defendants, to recover the damages occasioned by his death to his widow and children, a bill of particulars cannot properly be required.

It would be unreasonable to require the plaintiff in such actions, to state by anticipation all the items, and the amount of each, that the court might hold would properly enter into the computation of damages.

The alleged disposition of ordinary jurors, to give extravagant damages in such cases, is not a sufficient reason for granting a struck jury.

As the damages, in such cases, are limited to the pecuniary loss, when, in the judgment of the court, they exceed any reasonable estimate of such loss, the verdict will be set aside.

At Chambers, Jan., 1853.—This was an action under the statute to recover the damages, resulting from the death of the intestate, to his widow and children. The defendants were the proprietors of an omnibus line, and the complaint averred that

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by the gross negligence of the driver of one of their stages, the deceased had been run over, and had died in consequence of the injuries he received.

The defendants moved for a bill of particulars, and also for a struck jury, upon the ground that the prejudices of ordinary juries led them to give excessive damages.

For the reasons above stated, the judges, consulted by Campbell, J., were all of opinion that both motions ought to be denied.

They were denied accordingly.

KEELER v. DUSENBURY & OGDEN.

The examination of parties as witnesses, or the production of their books, cannot be compelled, under the provisions of the Revised Statutes, to perpetuate testimony.

Where no complaint has been filed, and the nature of the relief sought by the action is not shown by affidavit, the merits of the case cannot appear, and the court in its discretion should not compel the production of books.

January, 1853.

THE summons in this case was for general relief. The defendants appeared, but no complaint was served. The plaintiff applied under the provisions of the Revised Statutes, to perpetuate testimony (Part 3d, ch. 7, Tit. 3, art. 5), for an order and summons to examine the defendants, and to compel them to produce certain books and papers in their possession, containing reports and entries concerning the plaintiff's standing and credit as a merchant. On the day fixed for the examination of the defendants under the summons and order, objection was made by the counsel for the defendants, that their examination as witnesses or the production of their books could not be compelled by the proceedings which the plaintiff had taken for that purpose, viz. under the provisions of the Revised Statutes to perpetuate testimony.

EMMET, J.—I have looked into this question, and am of

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opinion that the objection is well taken. The Code, § 390, provides for the examination of a party as a witness, either at the trial, or conditionally, or upon commission; and expressly declares (§ 389), that no examination of a party shall be had on behalf of the adverse party, except in one of those modes. The present proceeding is not under the Code, but expressly under the provisions of the Revised Statutes to perpetuate testimony, which never contemplated the examination of a party. The examination of parties as witnesses was not then known to the law.

Neither do those provisions of the Revised Statutes give power to compel a party to produce his books, &c. That object can only be attained under Tit. 3d, ch. 1, part 3, § 30, &c., of the Revised Statutes, or under § 388 of the Code.

Both those enactments leave it to the discretion of the court to compel such production, and both make it a condition that the books, &c., required should contain evidence relating to the merits of the case.

If this application had been made under either of these acts, I do not think it should be granted. It is not easy to conceive what the merits of an action may be, or, indeed, that it can have any merits, on a bare summons for general relief, and before any complaint has been exhibited, and without even an affidavit disclosing the nature of the relief sought.

Strictly speaking, the merits of an action can only appear from the pleadings on both sides, and cannot be fairly presented until the cause is at issue. But, assuming that it is sufficiently apparent, that the plaintiff's object in this proceeding is to obtain the necessary materials from the defendants' books to frame a complaint against them for a libel, I should much doubt the propriety of exercising the power of the court to facilitate such a purpose under any form of application, without strong affidavits, showing its necessity to enable a plaintiff to obtain redress.

The motion to compel obedience to the order and summons must be denied, but without costs, the question having been submitted as somewhat novel in its character.

Approved on consultation.

Hubbard v. Guild.

v.

When in an action against joint debtors the Superior Court has acquired jurisdiction by the service of the summons upon one of the defendants, the property of any other defendant, who is a non-resident, may be attached under § 227 of the Code.

At Chambers, January 3.—The action was against two defendants, jointly liable upon a contract, and the summons had been personally served upon one of them; and the other, upon whom it had not been served, and who had not appeared, was proved to be a non-resident, and an application for a warrant of attachment against his property was made at Chambers, to Mr. Justice Campbell.

The judges consulted by him were all of opinion that as the court, under § 33, sub. 2, of the Code, as amended by the act of April, 1852, has now jurisdiction in all suits against joint debtors, where the summons has been personally served upon any one of them, it was a necessary consequence that the property of a non-resident defendant, not served, and not having appeared, might be attached under § 227 of the Code. There was no longer any distinction, in such cases, between the powers of the judges of this, and of the Supreme Court.

The warrant prayed for was therefore granted.

HUBBARD and others v. — GUILD.

A solvent partner is not entitled by law to the sole administration of the assets of the partnership, which is dissolved by the separate insolvency of one or more of the partners.

(At General Term, before OAKLEY, CH. J., DUER, CAMPBELL, and BOSWORTH, J.J.)

January, 1853. \

THIS was an appeal from an order granting an injunction, and appointing a receiver, in an action for settling the accounts, and

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paying the debts of a dissolved partnership. It was admitted that the partnership was dissolved by the personal insolvency of some of the plaintiffs, but it was proved to the satisfaction of the court that the defendant, Guild, was entirely solvent. His counsel, therefore, insisted that his legal rights were exactly the same as those of a surviving partner, and consequently, as there was no allegation of fraud or mismanagement, that he was entitled to the sole administration of the partnership assets. The court said, that had there been a provision in the articles of co-partnership, that in the event which had happened, the solvent partner should alone be entitled to settle the accounts, dispose of the property, and close the affairs of the firm, they would have felt it their duty to give it full effect, by dissolving the injunction, and discharging the order for a receiver; but that in the absence of such a provision, and of any express decision or authority, they could not be governed by the imperfect analogy upon which the counsel had insisted. They could not say that the insolvent partners were divested of their legal rights as joint owners of the partnership assets, and deprived of all agency or voice in closing the business of the firm. In their opinion, the right of the plaintiffs to demand the appointment of a receiver, was exactly the same that it would have been had the partnership been dissolved from any other cause than their own insolvency.

The court added, that they saw no reason why the defendant should not himself be appointed the receiver, if he would give the necessary security. It seemed to them that in all cases where the dissolution of a partnership is occasioned solely by the insolvency of one of the partners, the solvent partner ought to be appointed receiver, when his capacity and integrity are unquestioned. The referee, therefore, to whom the appointment was referred, might, upon due inquiry, report the name of the defendant.

The order of reference was accordingly so modified.

Evarts, for plaintiffs.

Leonard, for defendant.

Coates v. Coates.

O'BRIEN v. HAGAN.

When the plaintiff or defendant in a civil suit is sentenced to imprisonment in the state prison, although only for a term of years, the suit is abated.

At Chambers, January, 1853.—The plaintiff having been convicted of a felony, and sentenced to be imprisoned in the state prison for a term of years, the defendant obtained from him, after the sentence had been pronounced, a release of the demand, or damages, for the recovery of which the suit was brought, and now moved for leave to file a supplemental answer, setting up the release as a bar.

The judges consulted by Oakley, Ch. J., were of opinion that the necessary effect of the provision in the R. S. (2 R. S., § 19, p. 701), which suspends all the civil rights of a person so convicted and sentenced, during the term of his imprisonment, was to abate the suit, and, consequently, that no further proceeding could be had therein, until it was properly revived. They declined to give any opinion upon the question, whether a release given by a person so sentenced, even if founded upon a valuable consideration, would be a valid defence.

Upon the first ground, the Chief Justice denied the motion.

COATES v. COATES.

Counsel fees for defending the suit, and moving to dissolve an injunction, may be properly included in an estimate of the damages sustained by the defendant, in consequence of the injunction.

(At General Term, before OAKLEY, CH. J., DUER, CAMPBELL, and BOSWORTH, J.J.)

January 22, 1853.

THE plaintiff, upon the usual undertaking, had obtained an injunction restraining the defendant from the use of certain

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trade marks. This injunction was dissolved upon the motion of the defendant, founded upon his answer, and a large number of affidavits; and the merits of the controversy being thus virtually determined, the plaintiff discontinued the suit. The usual reference was then had for ascertaining the damages sustained by the defendant, in consequence of the injunction, and it appeared from the report of the referee, that the damages, as estimated by him, consisted mainly of heavy expenses incurred, and counsel fees paid by the defendant in procuring the dissolution of the injunction; none of the charges, however, were such as could be included in the taxation of costs, and the court, after argument, were of opinion that they were properly allowed, and therefore denied a motion for striking them out from the report. (Code, 11, Paige, p. 227).

C. Edwards, for plaintiff.

A. Burrill, for defendant.

SMITH v. BROWN.

An inquest cannot be regularly taken on the first day of a trial term, unless the action is regularly called upon the calendar.

The rules of the Supreme Court, relative to proceedings at circuits, apply to the trial terms of the Superior Court.

At Chambers, Jan. 3, 1853.—The defendant moved to set aside the plaintiff's judgment as irregular, upon the ground that the inquest upon which it was founded had been taken out of the order of the cause upon the calendar, on the first day of the trial term, on which day a proper affidavit of merits had been subsequently filed.

The question was, whether the case was governed by the rule of the Supreme Court, which allows inquests to be taken at a circuit in actions out of their order upon the calendar, only upon some day after the first day of the circuit (rule 12). And

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the judges, consulted by Duer, J., were of opinion that the rule ought to be construed as embracing the case, and that in all cases susceptible of such an application, the rules of the Supreme Court, relative to proceedings at circuits, should be construed to apply equally to the trial terms of this court.

The inquest and judgment were accordingly set aside.

W. W. Niles, for defendant.

E. F. Treadwell, for plaintiff.

RICHARDSON v. CRAIG.

The undertaking to warrant an order of arrest must in all cases be executed by the plaintiff, except where the plaintiff is a *feme covert*, or an infant.

At Chambers, Jan. 3, 1853.—DUEK, J., refused to grant an order for the arrest of the defendant, upon the ground that the undertaking on the part of the plaintiff was executed only by a surety, and not by the plaintiff. He held that although, in the discretion of the judge, sureties may be dispensed with, yet the undertaking must in all cases be signed by the plaintiff, and that the terms of § 182 of the Code admitted no other interpretation; and although the plaintiff was proved to be a non-resident, he could not for that reason allow an exception. When the plaintiff is a married woman, or an infant, he inclined to the opinion that the next friend, or guardian, might be reasonably considered a plaintiff, within the meaning of the Code, and an undertaking signed by him, upon that ground, be held sufficient. It was only by this construction that these exceptions could be reconciled with the language of the Code, which he thought was too plain and imperative to allow of any other.

OAKLEY, Ch. J., and CAMPBELL and BOSWORTH, J.J., concurred.

F. W. Platt, for plaintiff.

Halsey v. Carter.

CARY v. WILLIAMS.

A partner cannot arrest a co-partner upon the allegation of a fraudulent removal of partnership property.

At Chambers, Jan. 3, 1853.—The plaintiff and defendant were partners, and it appeared by the complaint that the action was brought to recover damages for the fraudulent removal by the defendant of a stock of goods belonging to the firm. An order of arrest was applied for upon affidavits setting forth the fraud.

DUER, J., refused to grant the order, holding that the action was not maintainable, and that the plaintiff had no proper remedy but in a suit for an injunction and a receiver.

Approved by the same judges.

HALSEY AND ANOTHER v. CARTER.

A defendant is not bound, in his answer, to set up a demand, which from its nature is a proper subject of a counter claim.

He may elect to enforce its recovery in a separate suit.

A defendant has at all times had such an election, in relation to a set-off, or a recoupment of damages, and his rights, in this respect, have not been varied or affected by the Code, §§ 149, 150.

At Special Term, Jan. 3, 1853.—These points arose, and were so decided by DUER, J., in the above case, and upon consultation his decision was approved by all the judges.

Quere, whether when a counter-claim is set up in the answer, the plaintiff should be permitted to discontinue merely upon the payment of costs?

This question was also partially discussed in the same case, but as it was unnecessary to be determined, no opinion was expressed in relation to it.

Bates v. Jaines.

GILBERT AND OTHERS v. BULKLEY AND CHAFLIN.

The Court may in the exercise of its discretion exonerate bail after the lapse of more than 20 days from the commencement of the suit against them.

At Special Term, February, 1853.—This was a motion for the exoneration of the defendants, as bail, upon their surrender of the defendant in the original suit, and the payment of the costs of the action. It was resisted upon the ground that more than 20 days had elapsed since the commencement of the suit, and that as no further time had been granted, before the expiration of the 20 days, for making the surrender, the bail were fixed beyond the power of the court to discharge them.

The judges, however, consulted by OAKLEY, Ch. J., were all of opinion, that whatever construction they might have been forced to give to § 191 of the Code, had it stood alone, they certainly possessed the discretion, that was denied them, under the general words of § 174, which authorize the court in its discretion, and upon such terms as may be just, not only to allow an answer or reply to be made, but any other act to be done, after the limited time. The surrender of their principal by the bail, was, in their judgment, an act, which these general words should be construed to embrace.

There appearing upon the papers sufficient reasons for thus exercising his discretion, the Chief Justice granted the motion.

BATES v. JAINES.

A notice of a motion cannot be so countermanded by the party who has given it, as to deprive the opposite party of the right of attending on the day specified and having the motion dismissed with costs.

February, 1853

Spies v. Joel

THIS was so decided by DUEB, J, at Chambers, and the decision was approved by the other judges upon consultation.

Mott and Cary, attorneys for plaintiff.

Genet, attorney for defendant.

SPIES AND OTHERS v. A. JOEL AND L. JOEL.

Semble,—That when an assignment made by a debtor, of all his property, for the purpose of satisfying particular debts, contains no provision relative to a possible surplus, the omission is not such evidence of an intent to defraud his creditors as will be deemed sufficient to warrant his arrest.

If the omission is, upon such an application, evidence at all, it is a presumption only that it raises, and this presumption is conclusively rebutted by showing that the preferred debts exceeded the value of the property.

At Chambers, February, 1853.—This was an application on the part of the defendants to vacate an order of arrest, which had been granted on the allegation that they had disposed of their property, with intent to defraud their creditors (Code, § 178, sub. 5).

It appeared that before the commencement of the suit they had made an assignment of all their property, directing that the avails should be applied to the payment of all the debts owing by them to certain creditors who were named, but containing no provision relative to the disposition to be made by the assignee of any surplus that might remain after the satisfaction of the debts specified, and this omission was relied on by the counsel for the plaintiffs, as conclusive evidence of a fraudulent intent, making it the duty of the judge to sustain the order of arrest.

It was, however, conclusively shown by the affidavits on the part of the defendants, that the preferred debts largely exceeded in amount the whole value of the property assigned, and that this was known to the parties when the assignment was made.

Linden v. Graham.

DUER, J.—It may be true, as the counsel for the plaintiffs has contended, that the court of appeals, by its recent decisions, has settled the law, that the omission in an assignment, giving preferences, of any provision relative to a possible surplus, is evidence of a fraudulent intent, which renders the assignment void under the statute. But, in my judgment, it is only a constructive fraud which is thus established, for I cannot regard the omission as evidence *per se* of an actual intent, existing in the mind of the debtor and governing his act; and I am clear in the opinion that it is proof of an actual intent, that in all cases, in which fraud is charged, ought to be required to justify or sustain an order of arrest. The constructive guilt of a debtor, who is innocent in fact, can never be held by me to be a sufficient ground for his imprisonment.

Let it be admitted, however, that such an omission as is now relied on affords some evidence of a fraudulent intent, actually existing in the mind of the debtor, it is undeniable that it is a presumption only that it raises; a presumption which the debtor is competent to meet and repel, and which in the case before me is conclusively repelled. It is proved to my entire satisfaction, that the property assigned will be insufficient to satisfy the debts which are directed to be paid, and that this insufficiency was known to the parties when the assignment was executed. It is manifest, that there could have been no intent to defraud the general creditors by the appropriation of a surplus to the use of the defendants, if not only no such surplus was expected to arise, but it was certainly known that none would exist, and such I am satisfied were the facts. Order vacated, and defendants discharged.

Approved by OAKLEY, Ch. J., CAMPBELL and BOSWORTH, J.J.

LINDEN v. GRAHAM.

In an action for slander of title, whereby the plaintiff was prevented from obtaining a loan on the mortgage of the property, or from selling it, it is essential to stating a cause of action, to name the person or persons who refused, for that cause, to loan or purchase. If not named, the complaint is demurrable.

(General Term, Feb. 1853. OAKLEY, CH. J., CAMPBELL and BOSWORTH, J.J.)

Linden v. Graham.

THIS case came before the court on an appeal from an order made at special term, overruling a demurrer to the 5th cause of action set out in the complaint. The cause of action stated is, the speaking of slanderous words of and concerning the plaintiff's title to certain lands, whereby he was prevented from procuring a loan upon a mortgage of the lands.

This court states, that the plaintiff "caused application to be made to one Samuel Osgood, being in the business of loaning money for others, and the said Samuel Osgood, but for the grievances hereinafter stated, could and would have procured such money, so applied for, to be loaned to the plaintiff, upon the security of a mortgage upon such lands." It then sets forth the words spoken, and avers that, by reason thereof, "the said Osgood, and his various friends and customers, refused to complete and carry out such contemplated loan, to the great damage and injury of the plaintiff."

The demurrer assigns for cause,

1. That this count does not state facts sufficient to constitute a cause of action.
2. That there is no averment of any special damage therein.
3. That no person is therein named who promised or intended to make, or would have made, any loan on said property.
4. That the not obtaining a loan thereon, is no special damage.

T. J. Glover, for defendant and appellant.

H. Brewster, for respondent.

BY THE COURT. BOSWORTH, J.—This count does not name any person with whom Osgood was in treaty for a loan, upon the security of a mortgage of plaintiff's land, and who would have made a loan but for the speaking of the slanderous words.

Words spoken of and concerning the title to property are not actionable *per se*. Special damage must have resulted, or no action will lie. This must be stated in the complaint. To make such a statement as will constitute a cause of action, the person must be named who was induced not to purchase or make a loan by reason of the slander.

In *Malachy v. Soper et al.*, 3 Bing. N. C. p. 371, the declara-

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tion was defective in the particular assigned for cause of demurrer in this action. After verdict for the plaintiff, the defendant moved in arrest of judgment, on the ground that the declaration did not state any legal cause of action. The court, on full argument, deemed the objection well taken, and arrested the judgment.

Lowe v. Harwood, Cro. Car. 140; *Tasborough v. Day*, Cro. Jac. 484; *Manning v. Avery*, 3 Keble, 153; and *Cane v. Goulding*, Style's Rep. 169, 170, were cited by the court as authorities fully sustaining their judgment.

We apprehend that, in all actions of slander for words not in themselves actionable, the right to recover depends upon the question whether they caused special damage, and that the special damage must be fully and accurately stated. If the special damage was a loss of customers, or of a sale of property, the persons who ceased to be customers, or who refused to purchase, must be named; and that, if they are not named, no cause of action is stated. 1 Selden, R. 14, *Kendall v. Stone*.

In *Tobias v. Harland*, 4 Wend. 537, which was an action to recover damages for slanderous words spoken of articles manufactured by the plaintiff, whereby divers persons refused to purchase them, the declaration was held bad on general demurrer, because such persons were not named.

It is bad on general demurrer, because proof of the loss of other customers than those named is inadmissible. If none are named, nothing can be proved, and, as a necessary consequence, no legal cause of action is stated. Saunders' Ple. & Ev. 243 (5); 1 Hall, Sup. Ct. R. 399.

The person or persons who were induced, by the slander, to refuse to purchase, or make a loan, must be called as witnesses. Their declarations are inadmissible as evidence to make out a cause of action. *Tilk v. Parsons*, 2 Car. & P. 201.

It is obvious that, unless they are named, a defendant will be utterly unable to make any preparation to try the question of special damage.

On both authority and principle, we consider the count demurred to bad in substance, and that the order appealed from must be reversed, and an order entered sustaining the demurrer. In this conclusion the Judge who made the order appealed

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from concurs. The plaintiff may amend the count on payment of the costs of the demurrer and of this appeal.

QUIN v. CHAMBERS.

A demurrer, since the Code was amended in April, 1852, cannot be interposed to new matter in an answer, unless such new matter constitutes a *counter-claim*.

Any new matter set up as a defence, and not constituting a counter-claim, if it do not state facts sufficient to constitute a defence, may be stricken out as irrelevant, or, if the whole answer consist of such matter, judgment may be granted on account of the frivolousness of the answer.

(Before OAKLEY, C. J., DUER, PAINE, BOSWORTH, EMMET, J.J.)

General Term, March, 1858.

THIS case came before the court on an appeal from an order, declaring a demurrer to part of an answer to be frivolous, and that the defendant have judgment on account thereof.

The complaint sought to charge the defendant for the alleged conversion of personal property belonging to the plaintiff.

The answer, first, denied plaintiff's ownership, or that the defendant became wrongfully possessed of and converted the property. It next averred that defendant, as and being a constable, took it from the possession of John Connelly, on an execution against him, issued on a judgment recovered against him by William R. Lawrence and others, in the Justices' Court of the third judicial district, and that the property was in fact Connelly's. Other new matter was alleged which it is unnecessary to mention.

To such of the answer as contained new matter, the plaintiff demurred, assigning for cause that the same does not contain any statement of facts constituting a defence.

The defendant moved for judgment on the ground that the demurrer was frivolous, and on that motion the order appealed from was made.

J. D. McGregor, for appellant.

D.—I.

Quin v. Chambers.

J. H. Lane, for respondent.

BY THE COURT. BOSWORTH, J.—There seems to have been a misapprehension, by both parties, of the existing provisions of the Code in relation to the cases in which a plaintiff may demur.

There cannot now be a demurrer to new matter in an answer constituting a defence, unless such new matter sets up a counter-claim.

The allegation of new matter, not relating to a counter-claim, is not to be replied or demurred to, but “is to be *deemed controverted* by the adverse party as upon a direct denial or avoidance, as the case may require.” Code, § 168.

When it contains new matter constituting a counter-claim, the plaintiff may either reply, as to such new matter, by denying the allegations of it, or by a statement of other facts constituting a defence to it, or he may demur to it for insufficiency. Code, § 153.

The misapprehension has probably arisen from the fact that while §§ 153 and 168 were amended, § 154 was not modified.

It should have been amended by striking out the word “defence,” and inserting in its place the word “counter-claim.” After the amendments, passed on the 16th of April, 1852, took effect, only that part of the answer constituting a counter-claim could be replied to. (§ 153.)

A reply to new matter, not relating to a counter-claim, is not now allowed. The Code puts it in issue, and the issue is one of fact, to be tried by a jury. (§ 168.)

Section 154, to be sensible, must now be construed as speaking of new matter to which a plaintiff has a right to reply or demur at his election. The only new matter to which either a reply or demurrer may be interposed at the election of the plaintiff, is such as constitutes a counter-claim.

The section must be construed and applied as it would be if the word “counter-claim,” instead of the word “defence,” was contained in it.

The demurrer cannot, properly speaking, be said to be frivolous. It was wholly irregular and unauthorized, as much so as a demurrer to the plea of non assumpsit.

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No such proceeding is authorized by the Code when an answer sets up a defence, which is not a counter-claim. If an answer contains new matter not relating to a counter-claim, and such new matter does not state facts constituting a defence, the plaintiff must either move for judgment, on account of the frivolousness of the answer (Code, § 247), or to strike out such new matter as irrelevant, if it relates to only one of several causes of action, or constitutes one of several separate defences. (Code, § 160.)

If but a single defence be set up, and that applies to the sole cause, or to all the causes of action contained in the complaint, and the defence be frivolous, § 243 will enable the plaintiff to obtain a judgment on motion, without the delay of a trial.

If such defence be applicable to one only of several causes of action, or if other defences be also interposed, it can be stricken out as irrelevant, under § 160.

No order should have been made on the demurrer. The order appealed from must be reversed. As there has been an entire misapprehension by both parties as to the proper practice, in cases like that before us, and as the irregularity was one which did not, at the time, attract the attention of the court, each party must bear his own costs.

BELMONT and others, Respondents, v. SMITH, Appellant.

When a reference has been made of a collateral matter, in order to carry a judgment into effect, the report of the referee must be confirmed, upon motion, at special term.

When exceptions are filed to the report, they must be heard, not as a calendar cause, but as a non-enumerated motion.

Regularly no exceptions can be filed, not founded upon objections taken before the referee.

An affidavit of a party setting forth the proceedings before the referee, cannot be received as the ground of a motion for setting aside the report. A special report of the evidence must be obtained from the referee.

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A contractor, who under the provisions of his contract with the legal owner, has an equitable title to the house which he is building, is to be deemed the owner, under the Mechanics' Lien Act of 1851.

(Before DUER, BOSWORTH, and EMMET, J.J.)

General Term, March, 1853.

THE facts sufficiently appear in the opinion of the Court.

S. Sanxay, for appellant.

J. Larocque, for respondents.

BY THE COURT. DUER, J.*—This was an appeal from an order of the special term, made by Mr. Justice Emmet, confirming the report of a referee.

The action was brought to compel the specific performance of a contract, by which the respondents agreed to sell to the appellant four lots of land at the northwesterly corner of Avenue A and Twentieth street, in the City of New York, and to make him advances to be applied in the erection of buildings thereon, and the appellant agreed, upon the completion of the buildings, to accept a conveyance, and secure the consideration money and advances by bonds and mortgages; the contract contained a provision, that in case any liens or encumbrances, occasioned by the act or default of the vendee, should exist upon the premises when the deed would otherwise be deliverable, the respondents should not be compelled to make the conveyance, until such liens or encumbrances were removed.

It was alleged in the complaint, that the buildings had been completed in pursuance of the contract; that liens had been created by mechanics and material men, against the interest of the appellant in the property, under the mechanics' lien act of July, 1851; and that the appellant, instead of removing such liens and accepting the conveyance, and delivering the bonds and mortgages, in pursuance of his contract, had, upon the completion of the buildings, proceeded to rent the property, remained in possession, and refused to fulfil his contract.

Upon the trial, before Mr. Justice Campbell, in October,

* *Ex relations J. Larocque, Esq.*

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1852, a judgment was rendered in favor of the respondents, by which the amount due to them was liquidated at upwards of eighteen thousand dollars, and a reference was ordered to ascertain whether any such liens existed upon the property, and the amount of them; and the appellant was required, within fourteen days after confirmation of the report, to procure the discharge of the liens, and to perform his contract, or, in default thereof, the property to be sold, and the amount due to the respondents to be paid out of the proceeds.

The report of the referee having been made, the appellant filed exceptions to it. The respondents, upon an affidavit that no objections had been taken, or filed, before the referee, moved at the special term to set aside the exceptions and for the confirmation of the report. The appellant, in opposition to the motion, produced, and claimed to read, his own affidavit of the facts, with regard to the liens reported to exist by the referee, but did not procure or produce any report of the evidence upon which the report was made. The judge at special term made an order setting aside the exceptions, and confirming the report; and from that order this appeal was taken.

We think that the respondents' counsel pursued the right practice in moving at special term for the confirmation of the report, this being a reference of a collateral matter for the purpose of carrying a judgment into effect, and not of the merits of the action. The judgment was final, disposing of all the rights of the parties, and the reference was analogous to that in a litigated mortgage case, where the decree of sale provides for a reference to ascertain the amount due on the mortgage before it is executed; and in such a case the case need not go again upon the calendar, but if exceptions are filed to the report, they are heard as a non-enumerated motion. We think also, that the appellant could not regularly file exceptions to the report, without having interposed objections before the referee, and no provision being made by the law, or the present rules of the court, for such a cause, the practice, under the present nineteenth rule of the Supreme Court, is that of the late Court of Chancery, in respect to proceedings in the master's office. And manifestly the affidavit of the appellant of the facts upon which he claimed, that the alleged liens should be held not to

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be encumbrances upon the property, could not be received upon the motion to confirm the report, but the appellant should have procured a special report of the testimony before the referee. The judge at special term was therefore right in setting aside the exceptions, and confirming the report.

But as the appellant might have been relieved at special term upon his affidavit of having mistaken the practice, and possibly might be upon this appeal, it seems proper to consider the ground upon which he claims that the alleged liens are no encumbrances upon his interest in the property. He insists that he is not an owner or contractor within the purview of the lien law, having entered under a contract to purchase, and never having been invested with the legal title to the property. We are of opinion, however, that his possession under this contract, providing for the erection of buildings, and for his acquisition of the legal title upon their completion, constituted an equitable ownership, upon which the liens of mechanics might properly attach, and that upon the delivery of the conveyance to him by which the equitable would become merged in the legal title, those liens would be paramount to the respondents' mortgages. The language of the first section of the act is, that the mechanic or material-man, upon complying with its provisions, shall have a lien "to the extent of the right, title, and interest, at that time existing, of such owner." And we do not see why this language is not broad enough to embrace an equitable as well as a legal title. We are satisfied that this construction is necessary to give effect to the intention of the Legislature. Houses are now generally built under contracts similar to that which has led to this suit, and in all these cases, unless the contractor is to be deemed the owner, mechanics and material-men would be defrauded of their lien, and the act for their relief become a mockery and a snare.

The order setting aside the exceptions, and confirming the report of the referee, must be affirmed, with costs.

JOHN COOK v. T. STOKES DICKERSON and HENRY BREWSTER.

A judgment is not void, merely because the roll does not contain a copy of the verdict. Nor is it void when two defendants answer separately by different attorneys, and obtain a verdict, and a bill of costs is allowed to each attorney, merely because the judgment is entered in favor of the defendants jointly for the aggregate of such costs. A judgment will not be set aside for irregularity, if the motion is not made within a year after it is rendered. An execution is not void, for the reason that it is issued by an attorney, other than the one by whom the judgment was received; nor will it be set aside for irregularity on that ground alone. The items of costs, as adjusted by the clerk, and the affidavit of disbursements, must be filed, but not incorporated in the roll; they form no part of it.

Under the Code, an appeal from a judgment, though accompanied with a proper undertaking for the payment of the judgment, and the costs of the appeal, does not *per se* supersede an execution previously levied on personal property. The language of the Code, as to the effect of such an appeal, is identical with that of the Revised Statutes, relative to the effect of an appeal from a decree of the Court of Chancery. An appeal from the latter, and the giving such security, were decided by that court not to operate as a supersedeas.

(General Term, before OAKLEY, CH. J., DUER, CAMPBELL, and BOSWORTH, J.J.)
April 9th, 1853.

Two separate appeals, from two several orders, were argued together: one was an appeal by the plaintiff from an order, bearing date March 24, 1853, denying a motion made by him to set aside the judgment and execution being void, and for irregularity.

The other was by the sheriff, from an order directing him to proceed and sell the property, which he had levied upon by virtue of the said execution. This order bore date January 29, 1853.

The action was for an alleged false imprisonment and malicious prosecution. The defendants answered separately by different attorneys, and on the trial of the cause, on the 11th of April, 1851, the jury rendered a verdict in favor of the defendants. A separate bill of costs, in favor of each defendant, was adjusted by the clerk, on notice to the plaintiff's attorney.

On notice to the plaintiff's attorney, the judge who tried the cause made an order, "that there be allowed to the defendants

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in this cause, in addition to the specific costs adjusted in this case, the sum of \$125, being the full amount of per centage, on the sum claimed by the plaintiff, allowed by statute."

After a motion made at special term by the plaintiff for a new trial had been denied, and the order denying it had been affirmed on appeal to the general term, the defendants perfected judgment. The roll was filed, and judgment docketed, and execution issued thereon to the sheriff of the city and county of New York, on the 2d of March, 1852, and by him levied on property belonging to the plaintiff.

The judgment was as follows, viz.: "The verdict of the jury in this cause having been entered, whereby they find in favor of both the defendants, on motion of Henry Brewster, attorney for the defendant Dickerson, and on motion of Isaac Dayton, attorney for the defendant Brewster, it is adjudged that the said defendants do recover against the said plaintiff the sum of three hundred and forty-nine dollars and thirty-seven cents, for their costs and disbursements by them and each of them expended; this judgment being entered jointly for all the costs of defendants." The roll, when filed, did not contain the "verdict," or in other words, a copy of the minutes of the clerk, at the trial, of the verdict rendered. It was subsequently inserted by the clerk. The execution issued was signed by Brewster alone, as attorney for both defendants. The motion to set aside the judgment and execution, was noticed to be made on the 9th of March, 1853.

The affidavits, on which the order appealed from by the sheriff was made, showed, that after the execution had been levied, the plaintiff, on or about the first of May, 1852, appealed from the judgment to the Court of Appeals, and gave the requisite undertaking to effect a stay of proceedings, and notified the sheriff of such appeal, and of the undertaking given. On the 28th of September, 1852, the appeal was dismissed. A copy of the rule was served on the sheriff on the 2d of October, 1852, and he was notified to proceed on the execution. Subsequently, he was notified to return the execution. On the 20th of November he returned it. His return was in these words: "I return to the within execution, that under the same I duly made a levy upon the property of the defendant in exe-

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cution, and before sale thereof I was stayed by appeal duly perfected, from this Court to Court of Appeals, which is still therein pending. In conformity with notice of attorney for plaintiffs in execution, I hereby return the within." The defendants being informed that the sheriff's counsel considered the filing of a *remittitur* necessary, to the complete termination of the appeal, obtained one to be filed with the clerk of this court, on the 27th of November, 1852. On affidavit of these facts, and on notice of motion to the sheriff, and to the plaintiff, the order of January 29, 1853, was made. A deputy of the sheriff made affidavit, that believing the appeal to the Court of Appeals, and the security given therein, operated as a supersedeas of the execution, he took no further care of the property levied on.

S. Sanaway, for plaintiff, Cook.

H. Brewster, for the defendants.

A. J. Vanderpoel, for the sheriff.

In support of the motion against the sheriff, *Brewster* argued as follows :

In this case the sheriff has returned his execution, stating a levy, and that an appeal stayed proceedings, &c.

If the proceedings were stayed, the sheriff need not have returned the process ; but as he has done so, we claim the benefit of the levy.

There is now no stay of proceedings. At common law, in a case like this, the writ of *Venditioni Exponas* issued, of course, to complete the execution. (2 Ed. Graham Prac. 406-7 ; 1 Burrell, 1st Ed. 304 ; Cowper Rep. 406.)

This, though supplemental to the *fi. fa.*, is sometimes called an execution.

The Code, § 289, provides for execution, but makes no provision for a case like this.

We insist that we are entitled to the benefit of the levy, to

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enforce our priority and lien as of that date, and that the court have abundant power and authority to secure it to us.

The question is, how this is to be done under our new system?

1. All process is the mandate of the court to its officer to carry into effect their judgments, and the process and officer are both under the control of this court.

2d. The court, according to their practice, have a right to compel the carrying into effect of their judgments and orders in such manner as the statutes, and their rules and usage authorize.

The sheriff, however, objects to being required to go on, and insists that the mandate of the execution was superseded by the appeal.

To this we reply, that the appeal merely stays proceedings, leaving them to go on as soon as the appeal is ended.

At common law, and by the old statutes, writs of error, with bail, in four days after judgment, did supersede the execution.

So that, then, if it was issued within the four days, it was at the peril of being set aside, or superseded, within the four days that were allowed to bring error, if bail put in when required. (1 Wendell, 81, and note; *Kinne v. Whitford*, 17 J. Rep. 34; *Blunt v. Greenwood*, 1 Cowen, 21; *Jackson v. Eden*, 7 Cowen, 412; *Jackson v. Schaubert*, Id. 417 and 491; Tidd. Prac. 1070.)

The Revised Statutes have made two alterations. 1st. As to the time within which writ of error must be brought, in order to stay the collection of the judgment.

2d. That instead of superseding execution, it did not affect the execution at all of itself, but by section 29, 2 R. S. 596.

§ 30 specifies the effect of the order, which is only to stay the execution, not to supersede it, or set it aside. *Delafield v. Sandford*, 3 Hill, 473, shows this distinction.

The marginal note is erroneous, and tends to mislead.

The case of *Clark v. Clark*, 7 Paige, 607, goes entirely on the equitable power of the court to control its process, and direct a supersedeas.

In *Howard v. Pitt*, 1 Shower R. 404-5, the court say, granting a supersedeas is a discretionary act, and the court intimated

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the execution was erroneous, but refused to interfere on motion, and the defendant paid the money. (Allen on Sheriffs, 45, 46, 57, and 81; 1 Burr, Prac. 304; Allen on Sheriffs, 203-4; Tidd Prac. 1060.)

The sheriff had no right to stay without some mandate or order. There was none here. (8 Cowen, 192.)

The judgment is said to be irregular. The sheriff cannot object to irregularity. It is good as to him, unless void. (*Parmley v. Hitchcock*, 12 Wen. 96; *Ontario Bank v. Hallett*, 8 Cow. 192; *Ames v. Webber*, 5 Wen. 547.)

These informalities by the clerk do not affect the judgment (*Renouil v. Harris*, 2 Sand. 644-5).

The judgment roll is to be made up by the clerk. In the Code, § 264 provides for verdict, &c.; § 278 tells how judgment is to be entered; § 280 for entry in the judgment book; § 281 for the judgment roll; § 283 for execution.

The court are to be guided by the judgment.

The costs, as contained in the items, form no part of the roll (*Schenectady and Saratoga Plank Road Co. v. Thatcher*, 6 How. Prac. Rep. 226).

This answers, also, the objections of plaintiff.

It is said, however, that a joint judgment is a prejudice to the plaintiff, as it may be erroneous as to one, and not as to both, and he may be injured as to appealing.

So far from that being true, the gain is to the plaintiff, and the prejudice, if any, to the defendants, as if it is erroneous as to one, it will be reversed as to both. (*Farrell v. Calkins*, 10 Barb. S. C. R.; *Sheldon v. Quinlen*, 5 Hill, 441; *Cruikshank v. Gardner*, 2 Id. 333, and note, a.)

The costs are adjudged to the party, and if the parties interested choose to enter it jointly, the sheriff certainly cannot complain.

The plaintiff is also a gainer in the amount of sheriff's fees, &c.

Vanderpoel, contra, rested his argument upon the following points and authorities:

1. The perfecting of the appeal and filing the bond to stay

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proceedings under sec. 335 of the Code of procedure, released the property from the levy. Code, sec. 335, 337, 339.

The provisions of the statute, previous to the Code, will be found 2 R. S. p. 596, sec. 27, 29, 30.

Sec. 12 of the Code prescribes the duty of the court of appeals. Certainly under this section it cannot be pretended that the sheriff must, in case of an affirmance, proceed to sell goods levied upon under the execution issued before the appeal.

2. The Revised Statutes intended to alter the common law rule, and to relieve both parties from its hardships.

At common law, no bail was necessary or allowed. The party could sue out a writ of error in four days after judgment, and if he did so, an execution issued within that time was superseded. *People v. N. Y. Com. Pleas*, 1 Wend. 81.

Subsequently bail was required and the debtor was allowed four days further time. 3 Bac. Abr. "Tit." Error, p. 354; 1 Salkd. 321, 322.

The English statutes are collected in 1st Harrison's Dig. Tit. "Bail in Error."

And also, by statute, a special order of the court was made necessary.

It will be observed that the English statutes are very different from our own.

In England, error can still be brought at any time within 20 years without security, unless a stay is asked; but, to operate as a supersedeas of an execution previously issued, bail must be put in within four clear days after judgment signed, and this because the defendant having so long a time might delay his writ until actually issued.

The R. S. limited to four days, and rid us of the four day provision, and made other very important and salutary changes.

3. The practice and effect of this bail has been judicially declared under the Revised Statutes. *Delafield v. Sandford*, 3 Hill, 473; *Wilson v. Williams*, 18 W. 581; *Sheull v. Campbell*, 21 W. 287; *Clark v. Clark*, 7 Paige, 607.

We claim this as the effect of the bail and not of the writ, which only removes the record.

In appeals from the Chancellor, no provision for a stay was

made after execution issued; there it was usual to move for a supersedeas. 2 R. S. page 686, sec. 82.

As to practice on writs of error, *coram vobis*, see 20 Wend. The Code has not altered this construction.

4. By the English practice, the judgment creditor has but one security. Either the bond given to stay execution, or a bond superseding levy if made in four days, or the levy.

Our statute could not have intended to give a double security—levy and bond.

The bond with us has a double aspect.—1st. To give a security to the creditor.—2nd. To prevent personal property, the chief value of which depends upon the right to use and to transfer it, or which may be perishable, from being tied up.

The statute was passed to remedy the evils which existed under the previous system. A writ of error being a supersedeas, if sued out in four days the plaintiff sometimes lost his debt by the defendant wasting his goods or becoming insolvent before the judgment was affirmed.

So on the other hand the defendant was liable to have his goods sold before it was ascertained if the judgment was erroneous, or their value might greatly depreciate. The plaintiff could only ask an ample security.

Nor was it right that the property should remain in the sheriff's custody.

1. Inconvenience.

2. The risk and expense to which the officer would be subjected. *Moore v. Westervelt*, *Browning v. Hanford*, 5 Denio 586.

3. No answer to say the appeal may be dismissed, and then there is no remedy on the bond. The sheriff must not be subjected to the inconvenience of hasty legislation where his rights were clear before.

Suppose he levies upon a horse, a flock of sheep, &c. Is he to keep them? Who is to compensate him? See page 645 of Q. R. S. as to fees where an execution is stayed or settled before sale, \$1,00.

It is not true that a *fi. fa.* is an entire thing, and once commenced must be executed. The defendant is not discharged to

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the extent of the goods levied on for it. It is now held that a levy released at the debtor's request or for his benefit is not a satisfaction. *Greene v. Burke*, 23 Wend. 490; *People v. Hobson*, 1 Denio; *Ostrander v. Walter*, 2 Hill, 329.

BY THE COURT. BOSWORTH, J.—The plaintiff insists that the papers attached together and filed, as constituting the judgment roll, were insufficient to make a legal and valid judgment roll, for the reason that it did not contain a copy of the minutes of the trial, or the verdict rendered in the action.

The judgment itself recited that a verdict had been rendered in favor of both defendants. Prior to the making of this motion, a copy of the minutes of the trial had been inserted in the roll, informal in some of its parts, but showing a verdict in favor of the defendants, and that the court, on its being rendered, ordered judgment accordingly.

In *Renouil v. Harris*, 2 Sand. S. C. R. 641, this court at General Term, decided that a roll, which omitted the answer, was not a nullity, and that it was sufficient to support and give validity to the execution. That it is the duty of the clerk to enter the judgment and make up the judgment roll, and that if it should be made up defectively, the court, if necessary, would order the defects remedied as of the date of filing the roll. See *Clute v. Clute*, 4 Denio, 243.

The Revised Statutes, relative to amending pleadings and proceedings, cured such a defect. 2 R. S. 425, sub. 13, 14. It is an error, or defect, not affecting the substantial rights of the plaintiff, and the Code requires the court to disregard such errors, and declares that no judgment shall be reversed or affected by reason of such error or defect. § 176.

This section is also a conclusive answer to the objection, that the judgment should have awarded to Dickerson separately the costs taxed in his favor, and to Brewster the costs taxed in his favor, instead of awarding to the two jointly the aggregate amount of the costs taxed in favor of each.

This affected no substantial right of the plaintiff. He was adjudged to pay a certain amount of costs, and it did not prejudice any right of his, that has been shown, or suggested, to adjudge that he should pay the whole costs to the two jointly,

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instead of adjudging that he should pay a parcel of the whole amount to one, and the residue to the other. In addition to this consideration, an order was made on notice to the plaintiff, which directed "that there be allowed to the defendants in this cause, in addition to the specified costs adjusted in this case, the sum of \$125, being the full amount of per centage allowed by statute on the sum claimed to be recovered by the plaintiff." No appeal was taken from that order, and the judgment for the amount so allowed must necessarily have been in favor of both defendants jointly. The order seems to contemplate a judgment in favor of the two jointly for their other costs, as the sum of these and of the amount allowed are to be inserted by the clerk in the entry of judgment as an aggregate sum. Code, § 311.

As a general rule, a party who seeks to set aside a proceeding for irregularity, must make his motion, at the first opportunity after the irregularity has taken place, and the attorney must show due diligence in informing himself of it, Graham's Pr. 702. In this case judgment was entered on the 2d of March, 1852. The costs were adjusted previously on notice to plaintiff's attorney. This motion was noticed to be made on the 9th of March, 1853, over a year after the judgment was entered.

The Revised Statutes are peremptory, that no judgment, in any court of record, shall be set aside for irregularity on motion, unless such motion be made within one year after the time such judgment was rendered. 2 R. S. 359.

The day for which this motion was noticed to be made, was more than a year subsequent to that on which the judgment was rendered, and the judgment roll filled. If it be true, as contended, that, in such a case, there must necessarily be several judgments for the costs, then the rendition of a joint judgment, is an error appearing upon the record, and the plaintiff will have the benefit of it, on an appeal from the judgment of this court.

An execution may be issued in the name of an attorney other than the one by whom the judgment was recovered. Graham's Pr. 356; Code, § 289.

There are many papers embraced in the judgment roll, which should have been omitted. It should not be made to include

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any papers, or orders except those enumerated in § 281 of the Code. The costs, affidavit of service of the bill, a stipulation, and some orders in no way involving the merits, or affecting the judgment, should not be contained in it. Besides the fact that by § 281 of the Code they form no part of the roll, if an appeal be taken, the expense of printing unnecessary matter must be incurred, if they are not stricken out, and the papers to be furnished to the appellate court, will be encumbered with extraneous matter.

All papers incorporated into the judgment roll, not required by § 281, to form a part of it, may be detached by the clerk, and any amendments may be made which are necessary to make it conform with precise accuracy to the proceedings that have been had. These may be specified in the order to be entered, and any questions respecting them will be disposed of on the settlement of such order.

Neither the judgment roll nor the execution issued thereon is a nullity, nor was there any such irregularity, as in the exercise of a sound discretion, would justify the court in setting either aside.

The order of March 24, 1853, appealed from by the plaintiffs, must therefore be affirmed with costs. The only important question arises on the appeal taken by the sheriff from the order of January 29, 1853. That question makes it necessary for the court to determine what effect, the taking and perfecting of an appeal, in an action under the Code, and the giving of such security as operates as a stay of proceedings, have, upon an execution issued and levied on personal property prior to giving notice of the appeal.

If it merely stays further proceedings on the execution pending the appeal, the order appealed from is right. If it of itself supersedes the execution, and releases the property from the levy made upon it by virtue of the execution, the order is erroneous.

The plaintiff insists that the former, and the sheriff that the latter is the effect of a perfected appeal and the giving of security for the payment of the debt and costs.

Prior to the Revised Statutes, filing a writ of error and putting in bail within four days superseded an execution issued and levied within the four days. But if the writ was brought

and bail put in after the four days had expired, it did not supersede the execution, and courts of law disclaimed the power to make an order superseding it. *Blanchard v. Myers*, 9 J. R. 66; *Kinnie, qui tam, v. Whitford*, 17 J. R. 35; *Beekman v. Bemus*, 7 Cowen, 418; *Jackson ex dem. v. Schaubert*, 7 Cowen, 417; *Blunt v. Greenwood*, 1 Cowen, 15; *Payfor v. Bissell*, 3 Hill, 239.

In *Jackson v. Schaubert*, the proceedings of the plaintiff had been stayed to enable the defendant to bring error, and to prevent the judgment being executed in the mean time. After the lapse of more than four days, and after the execution had been levied, a writ of error was brought and bail put in, and although the court held that the time might be extended by order beyond the four days, with such effect as would enable the court to give relief, yet it merely stayed all proceedings on the execution, until the further order of the court.

The 2 R. S. 596, §§ 29 and 30, provides that the officer allowing the writ, on proper security being given, may indorse on the writ an order "staying proceedings on the execution," if one shall have been issued, and "that the service of such order shall stay the further execution thereof, at whatever time such order shall have been made or served."

No discrimination is here made between writs of error brought and bail perfected, prior or subsequent to the end of four days from the time of perfecting judgment. The writ, bond and order, and service of the order, may have been designed to be as effective, when interposed after, as before the expiration of the four days. The question is, do they operate as an absolute prohibition against further proceedings on the execution, or merely suspend proceedings upon it, until the writ of error is determined?

The language is peremptory, that "the further execution thereof," shall be stayed absolutely and unconditionally, from the time the order is served, no matter when it is served. It shall be executed no further, is the declaration of the statute. Such a construction, would give to the proceedings the same effect in all cases, as was given by prior law to a writ and bail within the four days. A contrary construction would put it out of the power of a party to obtain the relinquishment of a levy in any case, if made prior to the filing of the writ, though

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filed and bail put in within the four days. *Delafield v. Sandford*, 3 Hill, 473; *Clark v. Clark*, 7 Paige, 607.

When the statute declares, "that the service of such order shall stay the further execution thereof" (that is, of the *fi. fa.*) "at whatever time such order shall have been made or served," it may well be understood to mean, that the order and service shall be as effectual a supersedeas of the execution after the four days, as filing a writ and perfecting bail within the four days was by the pre-existing law.

The statute was enacted with a knowledge of that distinction. And when it declares that the service of the order shall be as effectual when made after as within the four days, the fair meaning of it would seem to be, that though made after the expiration of four days, it shall supersede the execution and any levy that may have been made under it.

This, however, is not a case affected by the law in relation to a writ of error under the Revised Statutes, but presents the question, as to the effect of a perfected appeal under the Code. The provisions of the Code, in relation to appeals, are copied from those of the Revised Statutes in relation to appeals from orders and decrees of the Court of Chancery.

The Code (§ 339) like the Revised Statutes (2 R. S. 607, § 86) declares that a perfected appeal, shall "stay all further proceedings in the court below, upon the judgment appealed from, or the matter embraced therein," except that when the judgment "directs the sale of perishable property, the court below may order the property to be sold, and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court." Code, § 342; 2 R. S. 607, § 89, sub. 1.

In *Clark v. Clark*, 7 Paige, 607, the Chancellor was of the opinion, that the perfecting of an appeal and the giving of perfect security to pay the judgment appealed from and costs, did not operate to discharge the lien of an execution previously levied, and imposed as terms of an order actually superseding the execution, and directing a restoration of the property levied upon, the payment of the sheriff's fees upon the execution, and \$12 costs of opposing so much of the motion as asked to have the execution set aside unconditionally, on the ground that so much of the motion was improper and could not be granted.

That decision was made with reference to statutory provisions almost identical in terms with those of the Code. If that decision was correct, the order appealed from by the sheriff is not erroneous. According to that decision, the plaintiff was not entitled, as a matter of right, on perfecting his appeal, to have the execution set aside, and his property released from the levy made upon it.

The Chancellor found his authority for setting aside the execution, even upon terms, in the discretion exercisable by that court.

In *Burr v. Burr*, 10 Paige, 169, the Chancellor affirmed the construction given by him in *Clark v. Clark*, that an appeal perfected after execution levied does not of itself stay the sheriff from proceeding upon the execution, and terms were imposed as a condition to the making of an order staying proceedings.

Prior to the Revised Statutes, the Court of Chancery, on cause being shown, allowed a respondent, to proceed in the court below, to enforce by execution the decree appealed from, when it was one for the payment of money, unless satisfactory security was then given, to pay the amount of the principal, interests and costs, on the affirmance of the decree. *Riggs et al. v. Murray*, 3 J. Ch. R. 160; *Missionier v. Raumano*, id. 66.

The language of the Code, as to the effect of an appeal upon proceedings in the court below corresponding with that relating to appeals from decrees in chancery, and the Court of Chancery having held in *Clark v. Clark* in 1839, and in *Burr v. Burr* in 1843, that an appeal with security for the decree and costs did not of itself supersede an execution previously levied, this court cannot adopt a contrary construction, without destroying all confidence in the uniformity of the principles and practice of the courts, regulated by statutes identical in their terms, and relating to the same subject matter.

The re-enactment of certain provisions of the Revised Statutes relative to appeals, with a knowledge of the construction given to the latter some ten years previously, without any modification of the clause relating to the effect of an appeal, would seem to be an approval of such construction.

Clark v. Clark and *Burr v. Burr*, are express authorities in support of the order appealed from by the sheriff, and the order must be affirmed, with \$10 costs.

Kinkaid v. Kipp & Brown.

KINKAID and WIFE *against* KIPP and BROWN.

Where a defendant, in his answer, has stated *nothing* on information and belief, his affidavit, that his answer is *true to his knowledge*, without adding the words "except as to the matters therein stated upon information and belief, and that as to those matters he believes it to be true," is a sufficient and proper verification.

One defendant cannot swear to the want of sufficient information to form a belief on the part of a co-defendant.

At Chambers, April, 1853.

THE facts appear in the opinion of the Court.

EMMET, J.—The nature of the complaint does not appear on this motion; but the defendants answered jointly and severally, that they were at and during the times mentioned in the complaint, owners of a line of stages or omnibuses, known as Kipp & Brown's line, and were engaged in the business of carrying passengers for hire in such stages between certain points in the city of New York. But as to each and every other allegation of the complaint, they say, "These defendants have no knowledge or information thereof sufficient to form a belief, and therefore they controvert each and every other allegation of the said complaint."

The verification is as follows: "Solomon Kipp and Abraham Brown, being severally duly sworn, say, each for himself, that the foregoing answer is true of his own knowledge, except so far as the same alleges a want of sufficient information to form a belief *on the part of the other defendant*; and that as to such allegation, he believes the same to be true."

The defect in this verification, as specified in the notice of motion, is, that it is not in the form, or to the effect and purport, prescribed by the statute, and does not state that the answer is true of defendants' own knowledge, except as to the matters therein stated upon information and belief; and that as to those matters, he believes it to be true.

This objection assumes, that in *all* cases where a pleading is verified, it is necessary, under the Code, to insert in the verification the exception as to matters stated on information and

belief, whether any matters are so stated in the pleading or not. And it may be the common practice to put the verification in that form, indiscriminately in all cases; but I have no hesitation in saying, that in a pleading which alleges or admits *nothing* on information or belief, it is not only unnecessary, but improper, to put such a senseless exception in the verification. It is improper, because it implies a falsehood, and makes the party swear to such false implication.

The Code (§ 157) does not in terms require that such a verification, as a *form*, shall be tacked to every pleading, whether it fits it or not; and it would be against common sense and reason to give it such a construction. If a party who, in his answer, has stated *nothing* on information and belief, thinks it advisable to swear that he believes such statement to be true, he doubtless has a right to do so; but if, in such a case, he confines himself to swearing that his answer is *true to his knowledge*, he not only complies with the requirements of the Code, but avoids what, to say the least of it, is a harmless absurdity.

As the answer in this case does not contain a single statement or admission on information and belief, a verification simply to the effect that the answer was true to the knowledge of the defendants, would therefore have been sufficient. But the verification in this case contains a peculiar exception, in a form and for a purpose altogether different from the exception referred to in § 157 of the Code, and which was inserted in order to guard each defendant from the manifest impropriety of swearing as to the insufficiency of information to form a belief possessed by the other defendant, as to the matters alleged in the complaint, not answered upon the *knowledge* of the defendants. The necessity for this exception might have been avoided by using this form of expression in the answer, "These defendants severally say, each for himself, that *he* has no knowledge or information thereof sufficient to form a belief," instead of "These defendants have no knowledge or information thereof sufficient to form a belief;" but as applied to the answer in its existing form, the exception does not impair the verification, and was a proper and conscientious reservation to be made by each defendant.

The motion, therefore, must be denied, but without costs.

Schneider v. Jacobi.

On questions of this nature arising under the Code, the failing party should incur no such penalty.

Approved upon consultation.

SCHNEIDER v. JACOBI.

When a complaint sets up a note and account, and the defendant, after setting up a counter-claim in his answer, serves an offer that the plaintiff may take judgment for a sum named, and the plaintiff recovers a verdict less in amount than the sum offered, with interest from the time of the offer to the date of the verdict, he must pay defendant's costs from the time of the offer.

An offer, made in that stage of the cause, its acceptance, and entry of judgment thereon, extinguish the counter-claim.

(Bosworth, J.)

At Chambers, April, 1853.

THE plaintiff declared on a note made by defendant, for the sum of \$78 50 due July 20, 1852, and for a mahogany chair sold and delivered about the 19th June, 1852, of the value of \$18, and claimed judgment for \$97 25 with interest from 20th July, 1852. The defendant, in his answer, submitted both the note and the account, and set up a counter-claim on which he claimed to be allowed \$30.

After serving the answer, and on the 14th September, 1852, the defendant served on the plaintiff an offer that he might take judgment for \$68 04. The offer was not accepted.

The cause was tried on the 9th of March, 1853, and a verdict was rendered for the plaintiff for \$69 40.

The plaintiff insists that he is entitled to recover his whole costs of the action, and the defendant, on the other hand, insists that the plaintiff must pay costs from the time of the offer. The present motion presents that point for decision.

John Moody, for plaintiff.

Fancher & Eagan, for defendant.

BOSWORTH, J.—The Code provides that “if the plaintiff fail to obtain a more favorable judgment” (than the one offered), “he cannot recover costs, but must pay the defendant’s costs from the time of the offer.”

If he had accepted the offer, he might have entered a judgment on the 14th of September, 1852, for \$68 04, exclusive of costs. The \$68 04, with interest to March 9th, 1853, amounts to \$70 32. On that day, he obtained a verdict for \$69 40. A judgment for that sum would be less favorable to the plaintiff by the sum of \$0 92, than the one entered upon the offer, according to its terms. He therefore failed to obtain a judgment more favorable than the one offered.

The plaintiff insists, that if he had accepted the offer, such acceptance, and a judgment conforming to the offer, would not have extinguished the counter-claim or set-off, and that he would have been liable to an action in respect of it. That the recovery has extinguished that, and therefore the judgment is more favorable than the offer by the amount of the counter-claim, or set-off so extinguished.

He relies on *Ruggles et al. v. Fogg*, 7 How. P. R. 324, as an authority in support of the proposition. In that case the offer was served before the answer was put in, and if it had been accepted, would not have extinguished a claim not then interposed in the action.

This case is clearly distinguishable from that. The counter-claim had been interposed before the offer was made, and the offer must be understood to have been made, with reference to the claims which each had previously set up in the pleadings against the other, and to be an offer that a judgment for \$68 04 might be taken, as being the sum conceded to be due after allowing all just deductions to the defendant. In this case, the defence set up arose out of the transaction, or contract under which the note was given, and I think there can be no doubt that an offer made, after the answer was put in, that the plaintiff might take judgment for a specified sum, and the acceptance of the offer, and the entry of a judgment according to it, would have extinguished the counter-claim.

The plaintiff is liable to pay the defendant’s costs from the time of the offer.

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In deciding this motion, it is assumed that the verdict will be sustained. The propriety of the decisions at the trial was not discussed on this motion, and has no connection with it. If the verdict shall be set aside, the whole judgment will be vacated. If a new trial should be denied, the present order, that the plaintiff pay defendant's costs subsequent to the offer, will have made the judgment proper in its terms and form.

Approved by the other Judges upon consultation.

In the matter of JOHN W. LATSON, on a Habeas Corpus.

A Surrogate's Court is a court of record within the meaning of the Revised Statutes, relative to proceedings as for contempts to enforce civil remedies, &c. It has, therefore, the same power as other courts, to punish persons guilty of contempt, and issue attachments for that purpose. But it has no power to enforce by an attachment against the person an order for the payment of money, if the money may be collected under an execution.

It has, therefore, no power to compel, by such an attachment, the payment of money due from an executor or administrator to the estate.

Held, therefore, that the prisoner who was held under such an attachment must be discharged.

(Before EMMET, J.)

April 19, 1858.

EMMET, J.—The return of the sheriff of the city and county of New York, to the habeas corpus issued in this case, states that John W. Latson is held and detained by him in custody, under and by virtue of an attachment issued out of the Surrogate's Court of Westchester county.

The attachment, which is part of the return, after reciting certain proceedings before the surrogate of Westchester county, in the matter of the estate of Jonathan Purdy, deceased, commands the sheriff to arrest the said John W. Latson, and bring him before the said surrogate, on the 14th April inst., to answer for his misconduct and contempt, in not obeying a certain order or decree, made on the 19th of July last, in the court of the said surrogate, on the final accounting of the said John W.

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Latson, as administrator, with the will annexed, of the estate of the said Jonathan Purdy, by which he was ordered to pay over certain moneys in his hands, and due from him to the said estate, within ten days from the date of such order or decree.

Among the objections made to the return in this case, it was urged (in reference to the sufficiency of this attachment on its face), that surrogates' courts are not courts of record; and as this attachment is a proceeding as for a contempt to enforce a civil remedy, and the power of punishing in such cases by fine and imprisonment, is in terms conferred upon courts of record, by the Revised Statutes (part 3d, chap. 8, Tit. 13, § 1), it may be proper briefly to consider that question.

A Surrogate's Court, as a court recognised by law, is the creature of the statute. Previous to the revision of 1830, the officers known as surrogates exercised a jurisdiction so undefined, as to create an apprehension that serious questions might arise from it, and to suggest the propriety of constituting surrogates' courts by law, and of defining and limiting their powers by clear and distinct enactments. They were classified, therefore, as courts of peculiar and special jurisdiction, and their duties were distinctly prescribed by statute (R. S., Part 3d, ch. 2, Tit. 1).

Among the powers thus conferred on them, was that of enforcing all lawful orders and decrees by attachment against the persons of those who should neglect, or refuse to comply with such orders and decrees, which attachment should be in form similar to that used in the Court of Chancery in analogous cases (§ 6, subd. 4).

They were also empowered, in the same manner, to the same extent, and with like effect, as courts of record;

To punish witnesses for disobedience to subpoenas, or refusing to testify (ib., subd. 2);

To exemplify transcripts of their records (subd. 5);

• To punish open and direct contempts in court (subd. 6);

And to issue process to, and exact obedience from, all sheriffs, jailors, coroners, or other executive officers (§ 9).

From these provisions it is pretty clear that although surrogates' courts may not be strictly courts of record in all their attributes, they can exercise certain powers, only incident to,

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and characteristic of, such tribunals; one of the highest of which is the power of punishing by fine and imprisonment, an authority which Blackstone (3d Comm. 24) asserts, cannot be exercised by any other court than a court of record, adding, that "the very creation of a new jurisdiction, with the power of fine or imprisonment, makes it instantly a court of record."

I consider the attachment in this case, therefore, in the same light as if it had been issued by a court of record, within the intent of the Revised Statutes, in relation to proceedings as for contempt to enforce civil remedies, &c. (Tit. 13, ch. 8, part 3d.) Or in other words, that the term "courts of record," in § 1 of that Title, embraces any court having the same power as courts of record have, to enforce its orders and decrees, for the payment of money, by attachment against the person; and it may fairly be inferred that the Legislature intended to put surrogates' courts on the same footing, in this respect, with courts of record, from the fact that the 20th section of the Title, in relation to surrogates' courts, expressly provides that the 10th, 12th, 13th sections, and section 16th to the 32d of the Title, in relation to proceedings as for contempt to enforce civil remedies, &c., shall apply to attachments issued by surrogates.

§ 1 of the Title referred to provides, that every court of record shall have power to punish by fine and imprisonment, or either, all persons (subd. 3), for the non-payment of any sum of money ordered by such court to be paid, in cases where by law execution cannot be awarded for the collection of such sum, &c.

The power of the court to cause the arrest and commitment of a party, for not paying money ordered by such court to be paid, is here expressly limited to cases where such money cannot be legally collected by execution.

As the law stood in relation to surrogates' courts, under the Revised Statutes, there was no provision for enforcing an order or decree of such a court, for the payment of money by execution. The only mode prescribed for that purpose, was by attachment against the person, under the 4th subd. of the 6th section of Title 1, chap. 2, part 3. The above limitation in § 1 of Tit. 13, ch. 8, part 3d, could, therefore, under the Revised

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Statutes, have had no application to the powers of surrogates' courts in such cases.

But an act was passed concerning the proof of wills, &c., on May 16th, 1837 (ch. 460, p. 535), by the 63d, 64th, and 65th sections of which it was provided that after any decree made by a surrogate for the payment of money by an executor, administrator, or guardian, he should make a certificate, stating the names of the parties against, and in favor of, whom the decree was made, with the amount of debt and costs, directed to be paid by such decree; which certificate should be filed by the clerk of the Supreme Court, and such decree docketed, which thenceforth should be a lien on the lands of the person against whom it was made; also, that execution should issue thereon in the same manner as though the same was a judgment obtained in the Supreme Court, and that if such execution should be issued and returned unsatisfied, the surrogate should, on application, assign the bond given by such executor, administrator, or guardian, to the person in whose favor such decree was made, for the purpose of being prosecuted.

This was modified by the act regulating liens upon real estate by judgments and decrees, passed April 1, 1844, by which the 64th section of the above act of 1837 was repealed, and as a substitute for it, it was provided that on filing the surrogate's certificate with the clerk of any county, the same should be entered and docketed as a judgment, and should thenceforth be a lien on all lands, &c., of the party against whom the decree was made in such county, and that execution should be issued thereon in the same manner as if it were a judgment recovered in the Court of Common Pleas of such county.

As the law now stands, therefore, the above limitation does in my judgment apply to the powers of surrogates' courts, and operates as a prohibition against the issuing of an attachment against the person of any party against whom an order or decree has been made for the payment of money.

Whether any certificate of the surrogate's decree in this case has been actually filed, or any judgment docketed, or execution thereon issued, does not appear, nor is it material. It can be done, and therefore execution can be awarded for the collection

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of the amount ordered to be paid. It is, therefore, directly within the limitation expressly imposed by § 1, Tit. 13, chap. 8, part 3d, upon the power of punishing by attachment for the non-payment of money.

This case, as presented by the return, is simply that of a debt due by an administrator. Whatever the fact may be, it does not appear that he refuses to pay with the ability to do so, or that there are any circumstances of fraud attending his indebtedness, which subject him to a more rigorous application of the law than should be administered to any ordinary debtor who cannot pay.

The debt, it is true, was incurred in the character of administrator, but that trust was committed to him under a bond, with surety, which may be prosecuted for his default, and which affords, therefore, an additional remedy for any party to whom he may be indebted.

The late chancellor decided in the case of *Hosack v. Rogers*, 11 Paige, 603, that since the passage of the act to abolish imprisonment for debt, a decree against an executor, directing the payment of money, could not be enforced by attachment, and that the remedy was by execution against the property of the executor. And the present surrogate of this county, in the case of *Doran v. Dempsey* (1 Bradford R. 490), while he asserts the power of surrogates to enforce all lawful orders, processes, and decrees, by attachment, avows that it is entirely in opposition to the spirit and scope of the recent legislation on the subject of civil remedies against debtors, to have recourse to that power to imprison a party for not complying with the requisitions of a decree directing a money payment, unless the debt has been fraudulently contracted, or the party against whom the decree was made, wilfully retains possession of funds or assets still in his hands, or refuses to pay when he has the means of doing so.

In this case, however, I place my decision distinctly upon the terms of the 1st section of Tit. 13, ch. 8, part 3d, of the Revised Statutes, and upon the limitation contained in the 3d subdivision of that section; and viewing that as a prohibition against the remedy by attachment to enforce the order or decree of a surrogate's court for the payment of money, for the

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collection of which an execution can be issued, I am of opinion that no legal cause is shown for the arrest or detention of John W. Latson, and therefore discharge him from the custody or restraint under which he is held, as appears by the return to the habeas corpus.

DUER, J., concurred.

LANG v. ROPKE.

The provision in the R. S. (2 R. S., § 87, p. 809), which made it the duty of the court, in which a judgment had been rendered in an action of ejectment, to vacate the same and grant a new trial upon the application of the party against whom the judgment was rendered, is applicable to actions for the recovery of real property under the Code.

But it is not applicable, when the judgment has been rendered in a controversy, submitted without action by the agreement of the parties. Code, § 372.

Not only is such a proceeding not an action, but the provision in the R. S., by its just construction, applies only to a judgment founded on the verdict of a jury.

So the new trial which the R. S. directs to be granted means a trial by a jury, but there can be no such trial, when the controversy has been submitted, since, by the express words of the Code, the case must then be heard and determined by the court at a general term.

The court has no power upon a motion, to release either of the parties from the legal effect of their submission, so as to enable them to litigate before a jury, the facts upon which they had agreed.

When a fraud or mistake is alleged, the court, as a court of equity, may have power to vacate the submission and the judgment, but this relief must be sought in a suit properly instituted for that purpose.

Application to vacate judgment, &c., denied without costs.

(Before OAKLEY, C. J., DUER, BOSWORTH, and EMMET, J.J.)

General Term, April, 1853.

THIS is the case in which judgment was rendered for the defendant in January term, 1852, as reported in 5 Sand. S. C. Rep., p. 363.

Application was now made to vacate the judgment and for a new trial under the provisions in the title "Of ejectment," in the Revised Statutes. The application had been denied at special term, and was now heard upon an appeal.

W. C. Noyes, for Sarah Lang, the appellant, insisted that she

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had a legal right to demand a new trial, and the court no discretion to refuse the application. The words of the Revised Statutes are imperative. They declare that the court in which judgment shall be rendered in an action of ejectment, "at any time within three years thereafter, upon the application of the party against whom the same was rendered, and upon payment of all costs and damages recovered thereby, *shall vacate such judgment and grant a new trial*" (2 R. S., § 37, p. 309), and the Code "enacts" that "the general provisions of the Revised Statutes, relating to actions concerning real property, shall apply to actions brought under this act, according to the subject matter of the action and without *regard to its form*." (Code, § 455.) The section in the R. S. upon which he relied, was a general provision in relation to actions concerning real property. The judgment which the court was required to vacate had been rendered in an action brought under the Code, and the application was made within the period limited by the statute. It was true that the submission of a controversy by the parties, is a novel proceeding, and not in the usual form of an action; but in applying the provisions of the statute, the court was bound by the Code to disregard the form of the action. The Code is imperative as well as the statute.

T. Hinsdale, contra.

BY THE COURT. OAKLEY, CH. J.—We are all of opinion that it is so far from being true that we are bound to grant this application, that we have, in reality, no power to grant it. Not merely is it not our duty, but it is not within our discretion.

We do not doubt that the general provisions in the Revised Statutes to which we are referred are imperative, in all the cases to which they apply; nor that they are applicable to all actions under the Code, for the recovery of real property; but the proceeding in which this judgment has been rendered, is not an "action," and by calling it such, we should contradict the plain words of the Code, which describe it as the submission by the parties, "*without action*, of a question in difference, to a court which would have had jurisdiction, *if an action had been brought*" (§ 372). It is equally clear that it neither falls within

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the former technical meaning of an action, nor within the terms of the definition which the Code has given (§ 2).

But could we, without a solecism, give the name of action to this voluntary submission, it is still certain that we could not apply the provisions of the R. S. to the judgment that we are now called upon to vacate. Section 37, in the title of ejectment, which contains the provisions relied on, plainly refers to the section which immediately precedes it, and reading it in this connection, it is manifest that the judgment which the court is directed to vacate, is a judgment upon a verdict, and the new trial which it is ordered to grant, a trial before a jury. But the judgment between these parties was not rendered upon a verdict, but upon a case to which they had agreed, and could we set it aside, we could not direct a trial by a jury, since the language of the Code is positive that the case, so agreed upon, *shall* be heard and determined by the court at a general term. It would, indeed, be absurd to send the cause to a jury, when the facts having been settled by the parties, questions of law alone would remain to be determined, and these questions which the court, upon full consideration, has already determined.

What we are therefore asked to do is not merely to vacate the judgment and order a trial, but to vacate the submission and annul the case to which the parties have agreed, so as to enable the plaintiff to contest before a jury, the facts which she *has admitted* to exist. It is exceedingly clear, however, that we have no such power, and equally so, that were the submission and case set aside, our jurisdiction would cease. It was the consent of the parties in the form prescribed by the Code, that alone gave us jurisdiction. Annul that consent and the jurisdiction is gone.

It is not alleged that Sarah Lang agreed to the case and its submission, upon which our judgment was founded, through fraud or mistake. Had the allegation been made, it could not have been listened to upon a motion like the present. In such a case, as a court of equity, we may have power to relieve her, but only in a suit properly instituted and upon a complaint properly framed. The submission of a controversy under the Code, is a contract of a high and solemn nature, and it is only upon the fullest evidence of fraud or mutual error, that a court

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of equity would ever adjudge it to be void ; and then only in a form in which their decision might be reviewed, and if erroneous, reversed.

It is possible, that although more than a year has elapsed since our judgment was pronounced, we might still, in the exercise of our discretion, grant a re-hearing, but no such application has been made, nor any reasons for such an exercise of our discretion been suggested ; and were the application now made, it is not at all probable that it would be granted. We see no reason to doubt the propriety of our former decision, and if the judgment then rendered is believed to be erroneous, it is still open to a reversal upon an appeal.

Motion denied.

BULKLEY v. SMITH, BRUSH, and KETTLETAS.

The provisions of the R. S. relative to the allowance of costs to defendants are repealed.

In actions for a malicious prosecution against several defendants, the allowance of costs to a defendant, who has answered separately and is acquitted upon the trial, rests wholly in the discretion of the court.

April, 1858.

THIS was an action for a malicious prosecution, in which the plaintiff had obtained a verdict against the defendants, Smith and Brush ; but the jury, under the direction of the Chief Justice, who tried the cause, had acquitted the defendant, Kettletas.

The plaintiff, in order to exonerate himself from the payment of costs to Kettletas, applied to the Chief Justice for a certificate that there was reasonable cause for making him a defendant. The application was founded upon § 19, ch. 10, Tit. 1, p. 3, of the Revised Statutes.

The judges, consulted by Oakley, Ch. J., were all of opinion that the provisions in the R. S. relative to the allowance of costs to defendants, were no longer in force ; and that as the defendants were plainly not united in interest, and Kettletas

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had made a separate defence, the allowance of costs to him was governed by § 306 of the Code, and therefore rested entirely in the discretion of the court. No judgment for costs could be rendered in his favor, unless upon his application, and when this application should be made, the question whether he was properly made a defendant might be considered. The plaintiff's application was therefore denied. Vide *Moore v. Westervelt*, 3 Sand. S. C. R., p. 762.

JOHN E. FLORENCE, by his guardian, v. E. BULKLEY, Administrator, &c.

It is not imperative on the court to make an order compelling a non-resident plaintiff to file security for costs.

When the application is not made until the cause has been referred and noticed for hearing, it will be denied, as unreasonably delayed.

For the same reason, an application on the part of the plaintiff, which otherwise would have been granted, to be allowed to prosecute *in forma pauperis*, will be denied.

(At Chambers, before BOSWORTH, J. May, 1853.)

THE defendant moved for an order requiring the plaintiff to file security for costs. The plaintiff moved for an order allowing him to prosecute the action *in forma pauperis*.

The action was commenced in May, 1852. On the 8th of October, 1852, it was referred, on defendant's motion, to a referee to hear and determine. On the 16th of November, 1852, the plaintiff noticed it for trial for the first of December. On the 18th of November, defendant obtained an order requiring the plaintiff to show cause why he should not file security for costs, and the plaintiff made an application such as he now makes. While the motions were pending, the original defendant, John Florence, died. Defendant Bulkley was subsequently appointed his administrator, and on the 19th of March, 1853, an order was made concerning the action against the administrator. Both motions were now renewed.

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A. Mathews, for defendant.

John Anthon, for plaintiff.

BOSWORTH, J.—If either motion is granted, the other must necessarily be denied. The plaintiff cannot be required to file security for costs if permitted to prosecute *in formâ pauperis*; nor be permitted so to prosecute if required to file such security.

The papers on which each motion is based contain enough, *primâ facie*, to entitle the applicant to the order sought. Still I think both should be denied. The defendant was dilatory in moving for security for costs. The action was commenced early in May, 1852, and the first order was obtained on the 18th of November following. The infancy of the plaintiff was known when the action was commenced. Before moving for security, the action had been referred, on the defendant's motion, and the plaintiff had noticed it for hearing.

It is not imperative on the court to grant the order under all circumstances. (*Robison v. Sinclair*, 1 Denio, 629.)

It is not necessary for the protection of the defendant. The attorney for the infant is liable for costs to the amount of \$100, and no question is made as to the responsibility of the guardian, who is undoubtedly liable, whether the attorney is or not (2 R. S. 621, §§ 7 and 8. Code, 316.)

Unless there are proper grounds for denying the plaintiff's motion, that of the defendant must necessarily be denied.

I do not understand that the statute imperatively requires permission to be granted to an infant plaintiff, in all cases, to prosecute *in formâ pauperis*, merely because his property does not exceed in value the sum of \$20, exclusive of the subject matter in controversy, though it appears he has a good cause of action. Graham, Pr. 915, 916.

The action has been pending over a year. The attorney voluntarily assumed such liability as to costs, as arises from his becoming the plaintiff's attorney. The guardian, in order to be appointed, was required to satisfy the court that he was able to respond to the defendant for his costs of the action, and he voluntarily assumed that position with its liabilities. Nothing is pretended to have occurred to justify the court in absolving

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him from such liability. The pecuniary condition of the infant, for aught that is shown, is the same as when the action was commenced. The infant, and not the guardian, applies for permission to the plaintiff to prosecute as a poor person. There has been precisely the same delay in making this motion, as that made by the defendant.

I think justice to both parties requires the denial of both motions, and that there is nothing so peremptory in the statute as to prevent this result.

Both motions are denied without costs of either to either party.

Approved on consultation.

THE UNION MUTUAL INSURANCE CO. v. OSGOOD and ALDEN.

When plaintiffs sue in a name which is appropriate to a corporate body, it is not necessary to aver in the complaint that they are a corporation.

A demurrer to the complaint on the ground that it contains no such averment will be adjudged frivolous.

When the want of a legal capacity to sue does not appear on the face of the complaint, the objection must be taken in an answer; it cannot be raised by a demurrer.

At Special Term, May, 1853.

THE plaintiffs moved for judgment on a demurrer to their complaint, on account of the frivolousness of the demurrer.

The causes assigned for demurrer were, that the plaintiff has not legal capacity to sue, because,

First, that the complaint does not show whether the plaintiffs are a voluntary association or a corporation. Second, that the complaint does not set forth the title of any act incorporating the plaintiffs.

Also, that it does not state facts sufficient to constitute a cause of action, in that it does not state that the plaintiffs had any power or authority to receive, hold, or own, the promissory note counted upon.

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There was no averment in the complaint that the plaintiffs are a body corporate.

Wm. M. Evarts, for plaintiff.

C. A. Rapallo, for defendant.

BOSWORTH, J.—There are two cases in Harrison's Reports, and two in Blackford's, adjudging the precise point; that it is unnecessary to aver that the plaintiffs are a corporation. 3 Harrison's R. 105, ed. 158, 4 Black. R. 267, 5 ed. 146.

The following cases in this state favor the same proposition: (1 J. C. 132, *Bank of the U. S. v. Hoskins*, 2 Cowen, 770; *Bank of Utica v. Smalley*,) and cases cited in the latter in the opinion of the court (4 Sand. S. C. R. 675, *The Holyoke Bank v. Hoskins*).

It is a general rule that it is unnecessary to aver anything in the complaint that is not required to be proved.

By 2 R. S. 458, § 3, it is provided that a corporation plaintiff created by the laws of this state, need not prove its existence on the trial of the cause, unless the defendant shall have pleaded in abatement, or in law, that the plaintiffs are not a corporation.

If the defendants deem such to be the fact, they can set up in their answer that the plaintiffs are not a corporation. 2 R. S. 458, § 3.

It does not appear on the face of the complaint that the plaintiff is not a corporation. It does not, therefore, appear that the plaintiff has not legal capacity to sue. Unless that appears, a demurrer cannot be sustained which is based on that objection. Code, § 144, sub. 2.

The name in which the suit is brought being an appropriate corporate name, the plaintiff will be intended, for all the purposes of the suit, to be a corporation, unless the contrary be averred by plea. 3 Harrison's R. 105; 2 R. S. 458, § 3; Laws of 1845, chap. 345.

The plaintiff must have judgment on the demurrer, but with liberty to defendants, on serving on plaintiff's attorney within five days from the service of this order, an affidavit of merits,

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to withdraw demurrer, and answer in twenty days, on payment of the costs of the demurrer.

Approved by all the judges on consultation.

THE PEOPLE, EX RELAT. L. TAPPAN v. ROSE PORTER, *alias* COOPER.

A judge of the Superior Court, in allowing a habeas corpus, and in his proceedings under it, can only exercise the powers which were conferred by statute upon a Supreme Court Commissioner. He is, therefore, not clothed with the discretionary powers of a judge in equity, in relation to the disposition and custody of infants.

The Supreme Court, as succeeding to the entire jurisdiction of the Court of Chancery, is the general guardian of infants.

As such, it has an exclusive right to determine all questions relating to their disposition and custody, except where those questions arise in a suit for an absolute or limited divorce.

The equitable powers of the Superior Court can only be exercised in those actions and proceedings which its jurisdiction, as defined by the Code, properly embraces.

A petition for a habeas corpus, addressed to a judge of the Superior Court, can only be founded upon the provisions of the general Habeas Corpus Act (2 R. S., § 1, art. 2, p. 183).

Hence the judge can only act in the cases which the statute enumerates, and can make no other final order or determination than that which the statute prescribes.

The reported cases in England are inapplicable. In all of those, the habeas corpus was a common law, not the statutory writ.

Distinctions between a common law and the statutory habeas corpus stated and explained. Critical examination of the adjudged cases in England and in this State.

Conclusions from this examination:—

1. That the basis of the common law, as well as of the statutory writ, is an illegal imprisonment or restraint, and, consequently, that when the restraint is disproved the jurisdiction ceases.

2. That when the restraint is adjudged to be illegal, the only order that can properly be made, is to discharge the person imprisoned or restrained.

And lastly, That the exception of infants, of such tender years as to be incapable of making a choice, is more apparent than real.

The Habeas Corpus Act, in its revised form, is greatly enlarged in its provisions, and improved in its details; but its sole basis still is, an illegal imprisonment or restraint, and the only authority of an officer acting under it, to discharge, bail, or remand the person on whose behalf the habeas corpus is issued.

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It appearing, in this case, that the child, on whose behalf the writ was issued, was not restrained of her liberty, *held*, that the judge could only declare that she was at liberty to go where she pleased, and could make no order for her delivery to her father.

(Before Duer, J.)

May, 1853.

THIS was a proceeding upon a habeas corpus, before Mr. Justice Duer. The object of the writ was to deliver an infant, aged about nine years, named Jane Trainer, from an illegal detention and restraint, in which it was alleged that she was held by the respondent, to whom the writ was directed. It was founded upon a petition, sworn to by Lewis Tappan, claiming to be the agent of the father of the child, Charles W. Trainer, and was allowed upon the 18th May, 1853.*

On the 23d of May the child was brought before the judge, and the respondent filed a sworn return to the writ, alleging, *inter alia*, as follows: "That the said Jane Trainer is not imprisoned, detained, or restrained of her liberty, or held in any custody against her will, by or under the control or direction of this respondent, or otherwise, but remains with the respondent of the free will of the said Jane, and from affection to the respondent." It was proved, to the satisfaction of the judge, that Trainer was the lawful father of the child, but, by his own confession, was a person of licentious and dissolute habits. It also appeared, that the respondent, to whom the child had once belonged as a slave, was a woman of ill-fame. The child, on being examined by the Judge, was unwilling to acknowledge Trainer as her father, and entreated to be permitted to remain with the respondent, to whom she was evidently attached.

The case was heard and argued on the 25th and 26th of May.

E. D. Culver, for the relator.

James T. Brady, for the respondent.

On the 28th, the Judge delivered the following opinion:

* There had been a previous writ, founded upon a petition, stating that the infant (a colored child) had been kidnapped by Mrs. P., and was detained by her as a slave. This allegation appearing to be groundless, this writ had been dismissed.

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DUER, J.—Having dismissed as groundless the original charge of kidnapping, this case is now before me solely upon the petition of the father, by his agent, Mr. Tappan, and the relief which is now sought is a compulsory order for the delivery of the child, Jane Trainer, into his custody. The first and by far the most important question to be determined is, whether my jurisdiction, which is precisely the same as that conferred by statute on Supreme Court Commissioners, extends so far as to enable me to make the order that is required; and if this question must be answered in the negative, it will be needless to inquire whether, upon the evidence before me, such an order could be justly or discreetly made.

I entirely agree with the learned counsel for the respondent, that I am not sitting here as a judge in equity, clothed with those large discretionary powers, in relation to the disposition and custody of infants, which the Lord Chancellor of England, as the representative of the sovereign, is competent and has been long accustomed to exercise.

Powers just as extensive, I doubt not, were vested in our late Court of Chancery, and if so, by force of the New Constitution and of the Judiciary Act of 1847, they have been transferred to, and are now vested in, the Supreme Court of the State, and the justices thereof; but they do not belong to me, either as a Supreme Court Commissioner, or as a judge of the Superior Court; I cannot therefore exercise the discretion which they confer, even could I be justified in acting, at the same time and in the same proceeding, in a double capacity. The Supreme Court, as succeeding to the entire jurisdiction of the chancellor, is the general guardian of infants, and as such, has the exclusive right to determine all questions, in relation to their disposition and custody, except where those questions properly arise in an action between husband and wife, for an absolute or limited divorce. It is true, that the Superior Court is now a court of equity; but it is equally so, that its equitable powers can only be exercised in those actions or proceedings which its jurisdiction, as defined by the Code, may be construed to embrace.

The petition for the *habeas corpus*, in the present case, was founded, and could only be founded, upon the provisions of the Revised Statutes; and as, in its form, it followed the words of

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the statute, those provisions not merely gave me the right, but made it my duty, to allow the writ. It is under the statute, therefore, that I am acting, and it is upon the just construction of its provisions that the nature and extent of my authority alone depend. I can act only in the cases which the statute enumerates and defines, and can make no other final determination or order than that which it prescribes.

Founding his argument upon the statute, the counsel for the respondent has insisted :

First. That a *habeas corpus* under the statute can only be allowed for the purpose of delivering the person, in whose behalf it is prayed for, from an illegal or unjust imprisonment or restraint, and, consequently, when the alleged imprisonment or restraint is denied by the return to the writ, and is not established by the proof, the jurisdiction of the judge or officer who issued the writ wholly ceases, and he is bound to declare that the proceedings before him are at an end. And,

Secondly. That where the imprisonment or restraint is admitted or proved, and is held to be illegal, the only order that can be made, is for the discharge of the person so imprisoned or restrained ; and that an order, even in the case of a minor or apprentice, relative to his future disposition or custody, as an excess of authority, would be absolutely void.

If the positions thus taken by the counsel are a just construction of the statute, it is a necessary consequence, that I cannot grant to the relator the relief which he seeks, by a peremptory order for the immediate delivery of the child into his custody, or into that of the father. If a *habeas corpus* under the statute may be properly used for the sole purpose of maintaining the rights of a parent and enforcing the obedience of a child, the order which is prayed for may justly be made ; but not, if the sole object of the writ, in a case like the present, is the delivery of the child from imprisonment or restraint.

The learned counsel for the relator, in controverting the positions that have been stated, deemed it unnecessary to refer to the actual provisions of the statute, but contended that the questions that have been raised as to their construction, and the extent of the authority which they confer, can no longer be regarded as open. He insisted that it is settled law—settled

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by a long series of decisions both in England and in the United States—that an officer, acting under the statute, possesses in its fullest extent the jurisdiction which is denied, and that, the rights of the father being established, not merely have I the power, but am bound to make the order which he solicits. These views of the learned counsel, I am inclined to think, correspond with what has hitherto been the general understanding of the bar; and I freely own, that, when the proceedings commenced, I had no doubt of my authority to make such an order for the custody of the child, as, under all the circumstances of the case, I might deem to be expedient. I believed myself to possess exactly the same discretion as a court of equity, and this discretion, looking to the future welfare of the child, I was not merely willing, but desirous, to exercise. Having examined the subject, however, in the short intervals of leisure that have been allowed me since the case was opened, with all the attention of which I am capable, I am obliged to declare, that the conclusions to which I have been led are directly opposed to my preconceived opinion. The words of the statute, I am forced to say, allow no room for the exercise of a discretionary power, nor, as I am now persuaded, is any reported case to be found, in which such a construction has been given to them.

The adjudged cases in the English courts, whatever surprise the assertion may create, are in reality wholly inapplicable; they are inapplicable for the conclusive reason, that, in all of them, without an exception, the *habeas corpus* was a common law, and not the statutory writ, and the powers exercised by the court those which the common law, and not the statute, confers. Upon the question, therefore, that we are now considering, the power and duties of an officer, confined in his jurisdiction and in his actions by the provisions of the statute, these cases, in my judgment, throw no light whatever, and, at any rate, lend no aid to the argument on the part of the relator. The English *habeas corpus* Act, the celebrated act of Charles II., the second Magna Charta, as it is termed by Blackstone—is the substratum and model of our own statute, and there is not a shadow of evidence that any court or judge, when acting under its provisions, has ever claimed to exercise a discretionary power, by making any other order for the disposition of the

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person for whose deliverance the writ was issued than those which the words of the act specify and define. The act declares what judgment, according to the circumstances of the case, shall be pronounced at the close of the proceedings, and there is no evidence that any other has ever been given. The habeas corpus act was not framed to regulate the entire subject of which it treats. Its sole objects were to remedy particular abuses, and to relieve a particular class of persons, namely, those committed and imprisoned upon a criminal charge, leaving all other cases of unjust imprisonment or detention, in the words of Blackstone, "to the habeas corpus at common law." (3 Commen., pp. 137, 138.) Nor is this the only distinction between the common law and the statutory writ; there are many others, so material, that had they not been overlooked, the erroneous practice which has to some extent prevailed in this State, and which I am urged to follow, could never have arisen.

The common law writ can only be granted upon a motion in court, and whether it shall be granted or refused rests in the discretion of the court (Com. Dig. Tit. H. Corpus [3], pp. 56, 65; 3 Black. Com. 132, 5; Bac. Abrid. Tit. Ha. Cor. [B], 4).

The statutory writ may be granted by a judge in vacation, and must be granted if the application is in the form which the statute prescribes. It is then granted *ex debito justitiæ*, and the officer, who refuses to allow it, is subject to a penalty.

The common law writ, it appears from the cases, may be prosecuted by a husband, a parent, and a guardian, for the deliverance of a wife, a child, or a ward.

The statutory writ is prosecuted by the party for whose deliverance it is issued. The petition, it is true, may be signed by a third person on his behalf; but it is in the name of the prisoner that all the proceedings must regularly be conducted.

Lastly. The common law *habeas corpus ad subjiciendum*, requires that the person named shall be brought before the court in which it is returnable, "to do, submit to, and receive" whatever the court may consider in relation to him. 3 Black. Comm. 132.

The statutory writ is substantially in the same form, but the discretion which its general words may be construed to give, is

taken away by the positive direction, that when the proceedings are closed, the judgment shall be that the prisoner "be discharged, or bailed, or remanded." There are other differences, to which it would be useless to advert. It is sufficient to say, what no lawyer will deny, that however large the discretion which the common law may give, either in granting a *habeas corpus*, or pronouncing judgment upon its return, the same discretion can never be rightfully claimed by an officer acting under a positive law, unless the intention of the Legislature that it may be exercised is expressly or impliedly declared. Hence it is upon the true construction of the statute under which I am acting, that this case wholly turns, and it is only those cases which plainly bear upon this question that can have any application.

But I go still further. Were I at liberty to treat the present as a common law writ, and in pronouncing my judgment to assume the powers, not indeed of the Chancellor, but of a common law court, it is at least exceedingly doubtful, whether I would be justified in making the order that is now desired. Unless I greatly err, the law in England, with a single exception, which I shall hereafter state, is now established, that the jurisdiction of the Queen's Bench and of the Common Pleas upon the return of a *habeas corpus*, even when the case is not under the statute, is limited to the discharge of the person where detention or restraint is held to be illegal; and where the restraint is disproved, to a public declaration that he is at liberty to go where he may please, and will be protected by the court in the exercise of his freedom.

The earliest case I shall quote is *Rex v. Clarkson* (1 Strange, 446). The *habeas corpus*, returnable in the King's Bench, was granted upon the application of a husband, and its object was the restoration of his wife to his society and possession. The lady, however, when brought before the court, denied the rights of the person who claimed to be her husband, and the court said, that whatever might be his rights, they could make no compulsory order, but could only see that she was under no illegal restraint, and declare her at liberty to go where she pleased.

In the next case, *Rex v. Johnson* (1 Strange, 579), the action of the court was somewhat different; the contest related to the

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custody of a female infant, aged 9 years, and the court, at first, doubted whether they could do more than release her from an illegal restraint, but finally made an order for her delivery to her guardian.

In the succeeding year, however, the Court of King's Bench retraced its steps, and returned to its original doctrine, *Rex v. Smith* (2 Strange, 982). The habeas corpus was granted upon the application of a father, who sought to reclaim a minor child, a boy of 13, from the custody of an aunt, with whom he was living. When the parties were before the court, the legal right of the father to the custody being clear, it was insisted that he was entitled to a positive order for the delivery of the child, and the decision in *Rex v. Johnson* was relied on as a controlling authority. That case, however, the report says, upon full debate, was overruled, and the court said that they could only deliver the child from the control of the aunt, and inform him that he was at liberty to go where he pleased. The boy chose to remain with the aunt, and the court then told the father that he must seek his remedy by action or by some other proceeding.

I have found no case contradicting this limited construction of the powers of the court until the time of Lord Mansfield; but in several cases which came before his lordship and his brethren, it seems to have been intentionally disregarded and overruled. In the cases to which I refer, the doctrine is laid down or assumed, that, upon a *habeas corpus*, the court has a full discretion to make such an order as the particular circumstances of the case may seem to require, and may not only decide to whom the custody of an infant shall be given, but may even compel a reluctant wife to return to the house and submit to the authority of her husband (*Rex v. Meade*, 1 Burr. 542; *Rex v. Delaval*, 3 Burr. 1434, S. C.; 1 Black, 146; *Ward's case*, 1 Black; *Blisset's case*, Loft's R. 765). But this doctrine, which, if it did not strip the Chancellor of his jurisdiction, vested in the King's Bench, in the cases to which it applied, a co-ordinate authority, seems not long to have prevailed, and assuredly is not, at this day, the law in England. It was most distinctly rejected by Lord Kenyon and his associate judges in the cases

of *Rex v. Reynolds* (6 Term R. 499), and *The King v. Edwards* (7 Term R. 745).

In each of these cases the habeas corpus was granted upon the application of a master, who sought, by this means, to compel the return of a disobedient apprentice, but in each the writ was quashed, as it appeared to have been issued *without the consent and against the wishes of the apprentice*; and Lord Kenyon remarked in the second case, that the sole object of a habeas corpus "is the protection of the liberty of the party," in other words, his deliverance from an illegal imprisonment or restraint; evidently meaning that where this fact is shown not to exist, the jurisdiction ceases.

The cases to which I shall next refer are still more decisive, as showing how entirely the courts of common law in England have renounced the exercise of the discretion which was claimed by Lord Mansfield.

In the case of *The King v. De Mandeville* (5 East, 220), the writ was granted on the application of a mother, who had been driven by ill usage to separate from her husband, and who sought the aid of the court to compel him to restore to her custody an infant of only eight months old, which it was alleged he was about to take with him from the kingdom. The additional circumstances were that the child was a natural born subject and the father an alien enemy. The Court of King's Bench, however, denied the application, and remanded the child to the father, plainly upon the ground that he had a legal right to the custody, and consequently that the restraint could not be pronounced illegal.

The failure of this application compelled the mother to invoke the powers of the Chancellor (*De Mandeville v. De Mandeville*, 10 Vesey, 52); and although Lord Eldon declined, under all the circumstances, to change the custody, he enjoined the father from removing the child from the kingdom, and compelled him to give security to a large amount, that he would obey the injunction. In the course of his opinion, Lord Eldon referred to the former proceedings at law, and said that the court of King's Bench had very properly declined to interfere, not having within it any of that species of delegated authority

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which resides in the Chancellor, as representing the King in his beneficent character of *Parens Patriæ*.

This profound jurist, the greatest common as well as equity lawyer of his age, evidently meant that a court of common law, even upon a habeas corpus, can pass only *upon the question of legal right*, and has no power to grant that equitable relief which the Court of Chancery, as the general guardian and protector of infants, is bound to administer.

The next, *ex parte Skinner*, 9 J. B. Moore, 278, in the court of Common Pleas, was a strong case indeed. In this also, the habeas corpus was granted on the petition of a mother who sought to rescue an infant child from the custody of its depraved father, who had not only deserted the mother, but who was then living in open adultery with another woman. The authority of Lord Mansfield in *Bissell's case*, Lofft's Rep. 748, was strongly pressed upon the court, but was in effect overruled, and the judges, referring to the language and adopting the doctrine of Lord Eldon in *De Mandeville v. De Mandeville*, denied the application, declaring that the Chancellor was alone competent, by a proper change of the custody, to grant the necessary relief. The most *recent* case in England is *ex parte Sandilands*, which is reported in the last volume of that very useful and well selected compilation of law and equity cases, which is now in course of publication at Boston (12 Law and Equi. Rep. p. 463, S. C. 21, Law Jour. Rep. p. 326); and it affords a striking proof that the large discretion once claimed by the Court of King's Bench, if not wholly abandoned, is now reduced within its narrowest bounds. The motion for a habeas corpus was made on behalf of a husband, and its object was to compel a reluctant wife, who had deserted him without cause, to return to his protection and her own duties.

The case of *Rex v. Meade* (1 Burr, 542) was confidently relied on in support of the motion; for although in that case the habeas corpus was denied, it was so upon the sole ground that the husband had given his voluntary consent to the existing separation, and the language of the judges necessarily implied that this consent was the only bar to the success of his application. That this was the fair construction of that case was not denied by the court; but as it appeared from the affidavits, in

the case before them, that the wife was not in fact under any restraint, the judges all concurred in the opinion that the motion could not be granted, Lord Campbell, Ch. J., forcibly saying "that it would be useless to compel the appearance of the wife, since, if she were brought up, the judges could only ask her where she would go, and could not compel her to return to her husband." It must, however, be admitted that Lord Campbell, in the course of his opinion, distinctly stated that "the case of infants of tender years stands upon different grounds;" and this is, in fact, the solitary exception to which I alluded in the commencement of my remarks; the exception from the general rule that a habeas corpus, in a court of common law, can never be used for the sole purpose of enforcing marital or parental rights. The supposed exception, however, applies only to infants of such tender years, as to be incapable of making a choice; and in the case of *The King v. Greenhill* (4 Adol. and Ell. 642), the grounds of the exception, and the cases to which it applies, are so lucidly stated by that distinguished judge, Mr. Justice Coleridge, that I cannot do better than quote his language. These are his words: "A habeas corpus proceeds on the fact of an illegal restraint. When the writ is obeyed, and the party brought up is capable of using a discretion, the rule is simple and disposes of many cases, namely, that the individual who has been under restraint is declared to be at liberty, and the court will even direct that the party shall be attended home by an officer, to make the order effectual. But when the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that where the legal custody is, no restraint exists." In *Rex v. Greenhill*, the children, whose custody it was held belonged to the father, were not in court, and an order for their delivery to the father was therefore affirmed; but Coleridge, J., expressly says, that had they been in court, there would only have been a verbal declaration that the custody belonged to the father. It is evident, therefore, from these facts, and the remarks of the learned judge, that the alleged exception is more apparent than real. An infant of such tender years as to be incapable of rationally expressing its wishes, which is all that I can understand to be meant by "incapable of making a choice," is of

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necessity under restraint, and in order to determine whether the restraint is illegal, the court must determine to whom the custody belongs. When the infant is before the court, nothing more is necessary to be said, since the person entitled to the custody may then, without opposition, by taking possession of the child, assert his legal right; but when the infant under an illegal restraint is not in court, an order for his delivery must necessarily be made; for, in such a case, it is in reality nothing more than an order for his discharge. Since the case of *Rex v. Greenhill*, which, in awarding the custody of children of a very tender age to a profligate father in preference to their mother, was one of flagrant injustice, an act of Parliament, an act which we have adopted (2 R. S. p. 149), has been passed, giving to the courts of common law a discretionary power of awarding the custody to the mother; but in all other cases, I apprehend that the law is settled, that the only question to be determined upon a habeas corpus, where a restraint is proved, is its legality or illegality; and when it is held to be illegal, the only judgment to be pronounced, the discharge of the person restrained; and that no case is to be found, in which, there being in fact no restraint, any order whatever has been made.

I proceed next to inquire into the past condition and actual state of our own law.

During our whole existence as a colony, and until the year 1787, the English Habeas Corpus Act was in force, if not *proprio vigore*, yet as a part of our common law. In that year all English statutes were repealed, and this, as well as many others, was enacted by our Legislature, and in its new legislative form was nearly a literal transcript of the original act. Like that, it was confined to persons committed upon a criminal charge, and, like that, gave no other authority to a judge acting under its provisions, than to discharge, bail, or remand the prisoner brought before him. It was re-enacted substantially in the same form in the revisions of 1801 and 1813, and remained unchanged until 1818, when it was materially enlarged and improved; but, as the changes then made were incorporated in 1830 in the statute, as then revised and amended, and no case is to be found in the interval affecting their construction, it is not necessary now to advert to them.

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It follows from this statement, that none of the reported cases in this state between 1787 and 1830, in which a question as to the custody of infants has arisen, have any bearing upon the present discussion, since in all, as in the English cases that have been rejected as inapplicable, the habeas corpus was the common law, not the statutory writ. The cases that have most frequently been quoted and relied on, as proving the existence of the discretionary power that I am now required to exercise, are *The People v. Landt* (2 John. R. 374); *McDowle's* case (8 John. R. 328); *Ferguson's* case (9 John. R. 239); and *Waldron's* case (13 John. R. 419). It is not to be denied that the Supreme Court, in some of these cases, adopting the views, and nearly the language, of Lord Mansfield, in *Rees v. Delaval*, and of Ch. Tilghman in *The Commonwealth v. Aldrichs* (5 Binney, 520), asserted its power to make a positive order for the delivery of an infant into the custody of the person whom, according to the particular circumstances in evidence, it might deem to be entitled; but it is remarkable that, in each of the cases, the exercise of this discretion was, in fact, declined; and declined (I add) for reasons so applicable to the present case, that, were it possible for me to pass the limits of the jurisdiction which the statute gives, they would probably control my action.

Thus, in the matter of *Waldron* (13 John. R. 419), the court refused to take an infant daughter from its grandparents and deliver her to the custody of her father, it not appearing that she was kept against her will, and because, in the opinion of the judges, the court of Chancery, from its peculiar jurisdiction, was better able to protect and enforce the rights of the parties, and determine properly the question of custody, than a court of law, upon a habeas corpus. In *McDowle's* case, the language of the court, as to the impropriety of interfering against the will of an infant, is still more explicit. It amounts, indeed, to a denial of the right. A father claimed the restoration to his own custody of two sons under age, who were living as apprentices with the person to whom the writ was directed, and the ground of the application was, that their indentures were void, and their detention by their master therefore illegal. Thompson, Ch., in delivering the judgment of the court, said, "All that the court is required to do under this writ, is to see

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that the infant is not restrained against his will," and after referring to the cases, and particularly *Rex v. Smith*, in 2d Strange, he added, "In this case the court can only declare that these infants are at liberty to go where they please. They may go and put themselves under the care and protection of their father, or may return to the service of their master." The boys elected to remain with their master, and the court sent an officer with them to protect them on their return.

It has been strongly urged that the father has a paramount legal right to the custody of his infant children, and that the court, when it has no reason to believe that his power will be abused, is bound to make a positive order for their delivery into his possession and control; but the cases last cited, without advertng to any other, conclusively show that, even at common law, such is not the obligation of the court, whatever may be its powers.

The only cases, since the adoption of the Revised Statutes, that can be supposed to have any application, are *The People v. Chegaray* (18 Wend. 542), and *The People v. Meroein* (3 Hill, 399).

The People v. Chegaray is not founded upon the general Habeas Corpus Act, under which I am acting, but upon special provisions in the title of parents and children, in a prior chapter of the Revised Statutes (2 R. S., chap. 8, part 2, pp. 148-149); and these provisions, it is an obvious remark, were certainly useless, had the Supreme Court been deemed to possess, either at common law, or under the general statute, the same discretion, in awarding the custody of infants, as undoubtedly belonged to the Court of Chancery. Under these provisions, a wife living in a state of separation from her husband is authorized to apply to the Supreme Court for a habeas corpus to bring before it a minor child of the marriage, and the court, upon the return of the writ, is empowered to award to her the charge and custody of the child, under such regulations and instructions as the case may require. In construing these provisions in *The People v. Chegaray*, Bronson, J., truly observed, that "they had conferred a power upon the Supreme Court which it did not before possess; and that it was not the object of the common writ of habeas corpus to try the rights of

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parents or guardians to the custody of infants, but merely to deliver them from unjust imprisonment, and all illegal or improper restraint."

If the sole object of the ordinary writ is the deliverance of the party from an illegal restraint, it is a necessary consequence that the court, when it terminates the restraint, exhausts its power.

In the *People v. Mercein*, the Supreme Court (Nelson, Ch. J., dissenting), commanded the defendant by a positive order to deliver an infant under his control into the custody of the father; and so far as I have been able to discover, with the exception of Nickerson's case (19 Wend. 16), it is the only case to be found in our own reports in which a similar order has been made.

Passing over the objection that this decision is not easy to be reconciled with that of the court of errors, in *Mercein v. The People* (28 Wend., p. 64-106), it is subject to several observations which render it inapplicable as an authority that I am bound to follow.

First. Mr. Justice Cowen distinctly says, that the father, in prosecuting the writ, was in the exercise of a common law right, and that this right had not been taken away by the statute (3 Hill, p. 407); and Bronson, J., who concurred with him, had previously said that the statute did not apply to the case, and that the judge who issued the habeas corpus had exercised a common law, not a statute, authority (25 Wend., p. 82).

Second. The defendant, on behalf of the mother, insisted that he was entitled to retain the possession of the child, and hence it became necessary to decide to whom the custody belonged, in order to decide the question of an illegal restraint.

And lastly, the child was of such tender years as, in the judgment of the court, to be incapable of making its election; and, as I infer from the report, was not in the presence of the court when the decision was made. Had it been, an order for its delivery would have been unnecessary. The same observations, I apprehend, apply to Nickerson's case; the proceeding was at common law, for the writ appears to have been granted and returned at a general term; an opposite claim to the

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custody was set up, and the question of right was therefore necessary to be determined, and the child was not before the court when the order was made; to which I add, that, as the contest in that case was between the father and mother, a husband and wife living in a state of separation, the case, although not within the words, was plainly within the equity of the title of parents and children (2 R. S., pp. 126-7, §§ 1, 2); for if, under that statute, an infant may be taken from the father and given to the mother, *a fortiori* may the custody be transferred from the mother to the father, who at law has a paramount right.

I do not deem it necessary to examine the decisions upon a habeas corpus in other States of the Union, as, for several reasons, they have a very remote, if any, application; and from the review that I have now made of the English cases and our own, I feel warranted to draw the following conclusions.

First. There is no adjudged case in which it has been held that an officer, acting out of court, either under the original habeas corpus act, or the present enlarged and amended statute, when a person who has been illegally restrained is brought before him by a habeas corpus, has any authority to do more than simply to discharge him.

Second. There is no adjudged case in which it has been held that such an officer may supply the defect of his authority, under the statute, by assuming a discretionary power, which if it reside elsewhere than in a court of equity, belongs only to a court of common law in the exercise as a court of a common law authority.

Third. Comparing all the cases, and following the most recent, the law may now be regarded as settled, that the basis of the common law, as well as of the statutory habeas corpus, is an illegal restraint, and consequently that this fact must be admitted or proved to exist, to warrant any further proceeding on the writ.

Fourth. Even where a restraint is proved and is held to be illegal, the authority of the court, even when acting under the common law writ, is limited to the discharge of the person restrained, except in the case of an infant of such tender years as to be incapable of making a choice.

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Fifth. This exception, however, is more apparent than real, since in this case, the questions of right of custody and of illegal restraint are so inseparably connected that, in pronouncing a judgment, both must be determined, and it is only when the infant is not before the court, but is still in the possession of the person whose restraint is held to be illegal, that a positive order for its delivery is made. Such an order, under these circumstances, is in truth, nothing more than an order of discharge, since, when the infant is so young as to be wholly incapable of acting for itself, it can only be discharged from the restraint of one person by giving it into the custody of another.

Lastly. The authority which the higher courts at Westminster and the Supreme Court of this state now possess, of taking the custody of an infant from the father, to whom it legally belongs, and transferring it to the mother, creates no exception from the general rule, since, both in England and in this state, this authority is given by a special statute, which it is admitted was necessary to be passed, to justify its exercise. A special statute would have been useless, had the common law judges possessed the same discretion as the Chancellor.

The result of this investigation is, that, whatever may be my personal wishes, it is impossible for me to make any order relative to the future disposition and custody of the child, unless it can be shown that I derive the necessary authority from a just construction of the general statute upon which my proceedings are founded. (2 Rev. Stat., Pt. 3, Chap. 6, Tit. 1, Art. 2, p. 563.) No attempt, however, has been made to show that the statute gives the desired authority, either expressly or by implication; and had the attempt been made, a careful examination of the statute authorizes me to say, it must have been fruitless. There is not a section, sentence, or line, that could be fairly adduced to sustain the assertion. The Habeas Corpus Act, in its revised form, is greatly enlarged in its operation, and, it may be thought, somewhat improved in its language and details, but it is unchanged in its principle, and in the nature and extent of the relief that may ultimately be given; and to prove this, a special and critical examination of its various provisions is by no means required. There are a few sections only to which it can be necessary to refer. By the first section (p. 563, sec. 21), the

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right of prosecuting a habeas corpus is no longer confined to persons imprisoned for a criminal offence, but is extended to all, who, within this state, are "committed, detained, or restrained of their liberty, under any pretence whatsoever," with a few exceptions, not necessary to be stated, which are specified in the next section. It is therefore certain that an illegal restraint is now, as it has always been, the basis of the writ. It is this fact, therefore, that must be positively and distinctly stated and sworn to, in the petition upon which the application for the writ is founded (p. 654, sec. 25). If the fact is not so alleged, the officer to whom the application is made, would exceed his jurisdiction by allowing the writ, and it is equally plain that he would exceed his jurisdiction by refusing to dismiss it, when the allegation is shown to be groundless. As the formal assertion of the fact alone gives him jurisdiction, so the actual truth of the assertion can alone preserve it. If the writ, where there is no restraint, ought not to issue, it follows that, where there is no restraint, as erroneously issued, it must be quashed.

Where the jurisdiction of the officer issuing the writ is continued, and the restraint of the party brought before him, by virtue of the process, upon a due inquiry into its cause, is found to be illegal, the words of the statute, in prescribing the course to be followed, are free from a shadow of obscurity or doubt: they are most plain and unambiguous: they give no discretionary power, but impose a positive duty. The language is, that the officer "shall discharge the party from the custody or restraint in which he is held." (2 Rev. Stat. § 39, p. 567.) It is this order which the officer is bound to make, and I apprehend he can make no other. If he has any authority to make a further or different order, I am yet to learn from what source it is derived, and upon what grounds its exercise can be defended. It is not given to him by the statute: he has it not at common law: he has it not as clothed with the powers of a Chancellor. It may be that such an authority has not unfrequently been exercised; but if so, it has been exercised without inquiry and without right.

It remains only to apply the observations that have been made to the facts of this case, and this will not long detain me.

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Mrs. Cooper, to whom the writ is directed, and by whom it has been obeyed, denies, in her return, that the child Jane Trainer is detained by her, or in any manner restrained of her liberty. She admits that the child is free; she claims no right to her services, but asserts that she remains with her of her own free will, and solely from motives of affection. There is no evidence to show that this return is untrue; on the contrary, its truth has been proved by the examination of the child herself, who in the strongest terms, and in a manner that left no doubt of her sincerity, declared her attachment to Mrs. Cooper, and her desire to remain in her service and under her protection. Under these circumstances, I am constrained to say that Jane Trainer is not "imprisoned, detained, confined, or restrained of her liberty in any manner or upon any pretence whatsoever," and that the contrary allegation in the petition upon which the writ was allowed is shown to be groundless. I must therefore declare that I have no longer any jurisdiction; and that, as the *habeas corpus*, had the truth been known, ought not to have issued, it must now be dismissed.

Had a different return been made to the writ, had the respondent claimed the child as her slave, or set up, under a pretended contract, a right to her services, the result would have been substantially the same, since I could only have discharged the child from a restraint that I should have held to be illegal. In no event, under my present construction of my powers and duty, could I have made the order that is required. Did I indeed possess the ample discretion which belongs to the Supreme Court, as now the Court of Chancery of the state, I should probably have no difficulty in making a suitable arrangement for the future custody of the child. For manifest reasons, she would not be left with the respondent, nor, for reasons nearly as cogent, which his examination has disclosed, would I place her in the custody of her father. Yet I doubt not, that, even with the consent of the child, a disposition of her custody might be made, by which her future happiness and welfare would be effectually consulted.*

* It was the intention of the judge, and he so stated when announcing his decision, had it been in his power, to place the child in the custody of the Rev.

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As the case stands, I can do no more, following the example of the Supreme Court in McDowle's case, than say to the child: "You are free. If you please, you may go to your father, to whom your obedience is due, and put yourself under his care, or, if you so choose, you may return with the person with whom you are now living, and with whom, as you declare, you wish to continue."

[Chief Justice OAKLEY and Judges CAMPBELL and BOSWORTH, with whom only Judge Duer had the opportunity of consulting, concurred in the opinion that his whole authority was derived from the statute, and that, under the statute, he could make no order for the delivery of the child.]

Mr. Pennington, a highly respectable colored minister of the gospel, who most generously offered to take her into his own family, educate her as one of his own children, and give ample security for the faithful performance of the trust.

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A

ABATEMENT.

When the plaintiff or defendant in a civil suit is sentenced to imprisonment in the state prison, although only for a term of years, the suit is abated. *O'Brien v. Hagan*, 664

ACCOUNT.

See PRACTICE, 80, 84.

ACTION.

1. The action for the delivery of personal property under the Code is substantially the former action of replevin. *McCurdy v. Brown*, 101
2. Hence the plaintiff can only recover upon a legal title—he must show an absolute or special property giving him an immediate right to the possession. *id.*
3. To constitute a lien creating a legal title actual possession of the property is indispensable. *id.*
4. A person who advances money upon the faith that the proceeds of goods which remain in the possession of the owner will be applied to his reimbursement, although he may thereby acquire an equitable lien, has not a legal title to the possession of the

goods, and cannot, therefore, maintain an action for their delivery. *id.*

5. When the title of the plaintiff in such an action is denied by the answer, the defendant is not bound to prove the title set up in his answer, until that of the plaintiff has been established. *id.*

6. If, from the defect of proof, the complaint is dismissed, the defendant is entitled to a judgment for the value of the goods. *id.*

7. In an action to compel the delivery of a document in writing, the court will not set aside the proceedings on the ground that the paper, upon its face, has no value, if evidence to prove value may be given on the trial. *Knehue v. Williams*, 597

8. The question whether value can be shown by extrinsic proof is a question of law, which, when the document is set forth in the complaint, or is annexed, is proper to be raised by a demurrer. *id.*

9. A warehouse-entry, if evidence of the title of its possessor to the goods which it describes, is as properly a subject of an action for its delivery as a certificate of stock or a bill of exchange. *id.*

See PLEADING, 7.
PRACTICE, 91.

ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS.

AGENT.

See SALES, 1, 2.

AGREEMENT.

1. On the 26th July, 1849, the plaintiff and defendant entered into and signed the following agreement:—
 "C. W. Sandford, having caused a bond and mortgage for \$4,000, from Teunis E. Dikeman to Cathalina Corbett, to be assigned to Dr. Benjamin Brandreth, has received from him on account thereof the sum of \$4,000, bearing interest from the date hereof; said mortgage is to be foreclosed immediately, and out of the proceeds the said sum of \$4,000 is to be rendered to the said Brandreth, with the interest for the same, at the rate of seven per cent. per annum, until paid, and the residue due on said mortgage is to be paid to the said C. W. Sandford." *Brandreth v. Sandford*, 390
2. *Held*, that this agreement did not necessarily import a personal liability on the part of the defendant for the sum received, and that prior transactions between the parties which led to the agreement, might be properly resorted to for the purpose of showing that he was acting only as the agent of the mortgagee. *id.*
3. *Held*, also, that the agreement did not by its terms imply that the mortgage was assigned as a security for the repayment of the \$4,000 as a debt, but that by its fair interpretation it was evidence of a purchase by the plaintiff of an interest in the mortgage to the extent of the sum that he advanced. *id.*
4. *Held*, also, that if the defendant could be rendered liable at all, he could only be so as a surety, it being the manifest intent of the parties that the mortgage securities should be the primary fund for the reimbursement of the plaintiff. *id.*
5. *Held*, therefore, that *quidcumque videtur*, the plaintiff was not entitled to recover, as he had failed to aver or prove that he had exhausted his remedies upon the bond and mortgage. *id.*
6. The firm of S. D. & Co. being insolvent, executed an assignment of their partnership effects to the defendants in trust for the payment of their debts. Subsequent to the execution of the assignment, they executed to S., one of the firm, an agreement in the words and figures following:
 "Whereas several suits are now pending in one or more courts of law and equity, in the State of New York, and in other States in the United States of America, for the purpose of recovering certain claims or demands belonging to, or in which the Trustees of the estate of the late firm of Stainer, Dutilh & Co. are now interested, and in which several suits so depending, Edward Stainer, one of the members of the said firm, is made a party plaintiff or defendant, and such suits being for the benefit of the Trustees of said estate.
 "Now for and in consideration of the premises and other good and sufficient considerations, we, Holford, Brancker & Co., and Peter C. Pfeffel, the Trustees of the said estate, do hereby agree to pay and discharge all costs, damages, and charges out of the proceeds of said estate, which may arise in consequence of any or either of said suits; and agree and promise to save harmless the said Edward Stainer from any liability or claim by reason thereof."
 In an action by the assignee of S. to enforce payment of damage and costs incurred by him in actions concerning property held by him individually,
Held, 1. That the agreement was single and entire, and the indemnity which it promised, an exclusive charge upon the property assigned.
 2. That the agreement embraced only those suits in which the Trustees were interested; that it did not, therefore, embrace such as concerned property, which did not pass to them by the trust deed; that if it had been intended to embrace such suits, it would have been invalid, and would not be enforced by a Court of Equity.
 3. That by the assignment of the defendants for the benefit of their creditors the rights of the partnership creditors were fixed, and could not be varied by any subsequent act of the partners or trustees. That, by the terms of the assignment, the property was to be devoted to the payment of

partnership debts. Hence no subsequent agreement to apply a portion of it for any other purpose, could be upheld. *Bell v. Holford*, 58

7. Parol evidence is admissible in many cases to determine and define the subject matter of a contract, when such evidence is explanatory; never when contradictory. *id.*

8. It was competent therefore in an action on the agreement in question, to prove what suits were pending, and how the trustees were interested, but not to prove that the agreement meant to embrace suits in which they were not interested. *id.*

See BAILMENT, 7, 8.
COVENANT, 6.
EXECUTION, 1.
LEASE, 8, 9.
FRAUDS, STATUTE OF.

AMENDMENT.

See PRACTICE, *Amendment*.

APPEAL

See PRACTICE, *Appeal*.

ASSIGNMENT.

See AGREEMENT, 6.

ATTORNEYS AND COUNSELLORS.

1. The appointment or nomination of a special attorney, under the act of 1847 (Chap. 470, § 46), must be approved and ratified by the court before the person so appointed or nominated can be authorized to act. *Roy v. Harley*, 637

2. A person cannot be substituted as an attorney in the suit merely by filing the written consent of the first attorney, but, in all cases, an order of the court is necessary to render the substitution valid. *id.*

3. When these rules are violated, all acts and proceedings in the name of

a person claiming to act as a special or substituted attorney, are irregular and void. *id.*

4. Upon these grounds, a judgment dismissing the complaint and other proceedings in the name of a person claiming to act for the defendant as a special and substituted attorney held to be irregular and set aside. *id.*

See PRACTICE, 81-95, 96.

AUCTION.

See SALES, 1 to 9.

B

BAILMENT.

1. As a general rule, a bailee cannot set up a right of property in a third person to defeat a recovery by his bailor. *Bates v. Stanton*, 79

2. To this general rule, however, there are many exceptions. *id.*

3. *Semble*—That the right of the true owner may be set up in all cases where, upon his demand, the property has been in fact delivered to him before the commencement of the suit. *id.*

4. The law may be considered as settled, that such a delivery is an absolute bar to the claim of the bailor, when it is shown that he had obtained possession of the property by felony, force, or fraud. *id.*

5. *Held*, that the evidence given by the defendants upon the trial in support of their defence, that the goods in controversy had been obtained from an agent of the owners by collusion and fraud, was properly admitted. *id.*

6. *Held also*, that the record of a judgment in favor of the owners against the plaintiff for the recovery of the goods, was conclusive evidence of such collusion and fraud, the questions litigated and the parties being substantially the same. *id.*

7. When ale is sold in barrels, with an understanding that the barrels shall be returned, and not returned be charged to the purchaser at a stipulated price, the contract in relation to the barrels is a bailment, not a sale. *Wescott v. Tilton*, 53

8. The purchaser under such a contract, having sold the ale to the defendant with a similar understanding as to the barrels—*Held*, that the owner, the first vendor, upon proof of demand and refusal, was entitled to recover their value. *id.*

See DUMES, 2.

BANKS.

See CHECKS, 1.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The answer of the defendant, who was sued as the maker of a promissory note, set up as a defence, that the note in suit had been delivered to B for a renewal of a former note of the defendant, for the same amount, of which B was then the holder and owner. And that B, after such delivery, instead of returning the first note, kept them both, and therefore averred that no consideration had been given for the note in suit. *Catlin v. Hansen* 819
2. *Held*, that these facts constituted no defence to the present suit, since they were evidence that the first note, which, for aught that was alleged, was still in B's hands, had been satisfied, and could not therefore be enforced against the defendant. The answer therefore, in effect, proved that the note in suit was founded on a valid consideration. *id.*
3. *Held*, also, that the motion of the plaintiff, on the trial, to exclude the defence, as irrelevant, ought to have been granted. *id.*
4. The evidence which the defendant was permitted to give on the trial tended to prove that B, before the note in suit was delivered to him, had

parted with the first note to a holder for value, and that his transfer to the plaintiff of the note in suit was, therefore, a fraudulent misapplication. *id.*

5. *Held*, that as this defence was different in its entire scope and meaning from that set up in the answer, the evidence ought not to have been received. *id.*

6. *Held*, also, for the same reason, that the answer, under the provisions of the Code, could not be so amended as to let in the defence. *id.*

7. When a defendant, sued as the maker or endorser of a negotiable note or bill, proves upon the trial that it was obtained from him by fraud, or was fraudulently put in circulation, the plaintiff is bound to prove that he gave value for it when he received it. *id.*

8. When a valuable consideration, however, is proven, the burden of proof is again shifted, and that of showing that the plaintiff had notice of the fraud is cast upon the defendant. *id.*

See CORPORATION, 1, 2, 3.
SALES, 12, 13, 14, 15.

BOND.

See INTEREST.

C

CHECKS.

1. A bank paying a check, payable to order, upon a forged endorsement of the payee, is liable for the amount, either to the payee or to the drawer, whose funds are so applied. If the check was the property of the payee, the bank is liable to him. If the check never passed to him by a delivery, and he had no interest in it whatever, the liability of the bank is to the drawer. *Morgan v. Bank of State of New York*, 434
2. Such a check cannot be treated as payable to a fictitious person, or to bearer; but the payee, being a real

person, the presumption of law is that it was drawn with the intent of vesting a title in him, and in him alone.

id.

8. Hence, it is only from the payee that a third person can derive a valid title.

id.

4. If the check never became the property of the payee, it is a necessary inference that it was obtained and put into circulation by fraud.

id.

5. *Held*, upon these grounds, that the plaintiff was entitled to recover the amount of two checks, drawn by him and paid by the defendants, upon the forged endorsement of the payee.

id.

COMMON CARRIERS.

1. Although the liability of a carrier for passengers is in some respects more limited than that of a carrier of merchandise, he is bound to use the utmost care, diligence, and foresight, and if by the exercise of these, an accident from which an injury or loss has resulted might have been prevented, he is liable. *Calhoun v. Murphy*, 233

2. The judge was therefore correct in telling the jury that the defendants were liable, unless the accident, the overturning of a stage, which occasioned the injury to the plaintiff, was the result of irresistible force or inevitable accident, plainly meaning by "inevitable," an accident which human care or foresight could not have prevented.

id.

3. When the proprietors of a stage are accustomed to receive fare for the transportation of passengers on its top, they cannot impute negligence to a passenger thus seated.

id.

4. If negligence were imputable to the plaintiff, as there was no pretence for saying that it contributed to produce the accident or injury, it was no bar to his recovery.

id.

5. A passenger injured by two trains of cars, running in opposite directions, coming in collision, is entitled to recover, although at the time of the collision in an apartment of the bag-

gage car, if lawfully there; notwithstanding he knew the position to be much more dangerous, in the event of such a collision, than a seat in the passenger car, and that too, though the result may demonstrate that he would not have been injured if he had been in a passenger car. *Carroll v. New York and New Haven R. R. Co.*, 571

6. In that case, his imprudence or want of care does not contribute to cause the accident, which occasioned the injury.

id.

7. A passenger, in selecting his seat, if lawfully in the one selected, owes no duty to a railroad company requiring him to select one with a view to diminish the hazards that may attend an act of gross negligence, on the part of their agents, in the running of the trains; nor does any indiscretion in selecting it exonerate the company from liability for injuries resulting from a collision, caused by the gross negligence of their agents.

id.

8. If a collision thus occurs, a passenger who is injured by it may recover, if, as between him and the company, it was lawful for him to be where he was at the time of the collision, as his being there did not tend directly or remotely to produce the act or occurrence which caused the injury.

id.

9. He had not failed to perform any duty owing by him to the company, and as between him and it, he was not guilty of any negligence.

id.

COMPLAINT.

See PRACTICE, Complaint.

CONSIDERATION.

See AGREEMENT.

BILLS OF EXCHANGE, 8.

CONTEMPT.

1. The provisions of Title 18, Chap. 8, Part 3, of the Revised Statutes, not being inconsistent with those of the

- Code, fall within the exception in sec. 471 of the Code, and are not repealed. *The People v. Compton and others*, 512
2. Under that title, no person can be punished as for a contempt, unless it appears that his misconduct has tended to defeat, impair, etc., the rights or remedies of a party in a cause then depending in the court. *id.*
 3. But when this misconduct is proved, the powers of the court are not limited to the imposition of such a fine as may be sufficient to indemnify the party aggrieved, or to an imprisonment of the accused for the sole purpose of enforcing the payment of such fine, but extend to the punishment of the accused, when the misconduct is, in its nature, a "criminal contempt." *id.*
 4. When the misconduct is an act of disobedience to its lawful process, if the disobedience is shown to be "wilful," the court has the power, and is bound, to punish it as a "criminal contempt." *id.*
 5. In such cases, although no actual loss requiring an indemnity is shown, the court may impose a fine not exceeding \$250, and imprison the accused, for a term not exceeding six months, for no other purpose than that of punishment. *id.*
 6. Hence, to enable the court to exercise its discretionary power of punishment, interrogatories which are designed to show by the answers of the accused, the true nature and character of his misconduct, must be answered. *id.*
 7. *Held*, therefore, that the defendants were bound to answer whether they had voted for certain resolutions, the passage of which was relied on as evidence that their disobedience to an injunction was intentional and wilful. *id.*
 8. *Held*, also, that in all proceedings as for a contempt in a civil action, unless the contempt is shown to be criminal in its nature, the court can enforce no fine beyond the costs and expenses of the relator, except as a compensation for an actual loss. *id.*
 9. *Held*, that each of the defendants, in voting for a resolution of the Common Council, containing a grant to Jacob Sharp, and his associates, had violated the injunction by which such a grant was prohibited. *id.*
 10. *Held*, also, that, not merely the tendency, but the actual effect of this violation, was to impede and prejudice the rights and remedies of the relators in their pending suit against the corporation, by rendering the grantees necessary parties in its further prosecution. *id.*
 11. *Held*, therefore, and adjudged, that each defendant was guilty of the misconduct which, as a contempt of the court, was alleged against him. *id.*
 12. When in a proceeding as for a contempt in a civil action, the alleged misconduct is proved, and an actual loss to the relator is shown to have resulted, the court has no discretion as to the amount of the fine to be imposed. The relator is then entitled to a full indemnity, over and above his costs and expenses. *id.*
 13. The actual losses to which the provisions of the statute apply, are losses pecuniary in their nature, and capable of being estimated as such, with reasonable certainty. *id.*
 14. *Held*, that as there was no evidence that such a loss had been sustained by the relators, they were entitled only to their costs and expenses. *id.*
 15. *Held*, that the next and necessary inquiry was, whether the misconduct of the defendants was, in its nature, a criminal contempt—in other words, was the result of pardonable ignorance or inadvertence, or wilful and intentional? *id.*
 16. When a manifest contempt is proved, a statement in general words that the guilty party acted under the advice of counsel, will never be accepted by the court as excusing or palliating his misconduct. *id.*
 17. To enable the court to regard such advice, the names of the counsel, the information that was laid before them,

- and the exact import of their advice, must be fully stated. *id.*
18. If the advice was written, the writing must be produced—if oral, it must be verified by the affidavit of the counsel who gave it. *id.*
19. The belief of a person upon whom an injunction or other order of a court is served, that the court had no jurisdiction, furnishes a very slight, if any excuse for his disobedience. *id.*
20. His only safe course in such a case is to obey, knowing that if the process is wrongfully issued, the law will afford him full redress. *id.*
21. He who resists the order or process of a court of justice, trusting to his own belief of its want of jurisdiction, acts, in all cases, at his own peril, and when proved to be mistaken, is justly punished. *id.*
22. *Quere*, whether the rule laid down in *Coddington v. Webb* (4 Sand. Sup. C. R. 639), that in order to bring a party into contempt for disobedience to an injunction order, it must have been served upon him by the exhibition of the order itself, at the time of the delivery of a copy, ought, in all cases, to be followed? (Bosworth, J.) *id.*
23. Many reported cases show, that a party may be punished as for a contempt when he has designedly done acts, which he knew, at the time, the court had by an order prohibited him from doing; although at the time, the order had not been served nor entered, but had only been directed to be entered. (Bosworth, J.) *id.*
24. In order to prevent, in some cases, great and manifest injustice, it seems necessary that the application of the rule laid down in *Coddington v. Webb*, should be restricted. (Bosworth, J.)
- Of *General Habeas Corpus Act*, 2 Revised Statutes, see HABEAS CORPUS, 3, 4, 6.
- Of *Section 25*, in the Title in the Revised Statutes of the Action Ejectment, see LEASE, 11, 12.
- Of *Section 149 and 150*, Code, see PRACTICE, 5.
- Of *Section 152*, Code, see PRACTICE, 26.
- Of *Section 388*, Code, 60.
- Of *Section 219*, Code, 67.
- Of *Section 292*, Code, 75.
- Of *Section 37*, p. 309, 2 Revised Statutes, see PRACTICE, 90.
- Of *Section 8 and 9*, 2 Revised Statutes, p. 135, see SALES, 1.
- Of *Section 4*, Title 2, of Statute of Frauds, see SALES, 8.

CONVEYANCE

1. A conveyance of an undivided moiety of mortgaged premises, "*subject to the one half part of the mortgage*," does not create a personal obligation on the part of the grantee to pay one half of the mortgage debt. *Murray v. Smith*, 412
2. The provision in the R. S. that "no covenant shall be implied in any conveyance of real estate," is to be construed as meaning that no obligation, covenant, or promise to do or pay anything shall be implied against either party to such conveyance, from the terms of the conveyance itself. *id.*
3. But this construction is not inconsistent with the established rule, that either party to a conveyance is at liberty to show for any purpose, except to prevent its operation as a valid grant, that its true consideration was greater or less, and even wholly different from that which it specifies. *id.*
4. It follows, that evidence of an actual promise of a grantee to pay one half of a mortgage debt, subject to which the conveyance was made to him, is admissible, if, upon this promise, the deed was executed and accepted. *id.*
5. Evidence of such a promise is entirely consistent with the clause making the premises conveyed subject to one half of the mortgage debt; its

CONSTRUCTION.

- Of *Provision* in Revised Statutes that no covenant shall be implied in any conveyance of real estate, see CONVEYANCE, 2, 3.
- Of *Statute of Frauds*, see CONVEYANCE, 6.
- See FRAUDS, STATUTE OF.

sole effect is to enlarge the consideration expressed. *id.*

6. Nor is the statute of frauds, as excluding parol evidence of such a promise, applicable to the case. *id.*
7. While the agreement between the parties, which embraced the promise, was executory, it was binding upon neither, but when it was executed by the delivery and acceptance of the conveyance, the promise became valid and could be enforced. *id.*

CONTRACT.

See AGREEMENT.

CORPORATION.

1. A Mutual Insurance Company, authorized by its charter, for the better security of its dealers, to take premium notes in advance of persons intending to receive policies, and to negotiate such notes for the purpose of paying claims or otherwise in the course of its business, may lawfully transfer such notes to a party who has insured in the company, on account of a claim for a loss, or to any person, on a discount of them at the rate of 7 per cent. per annum. *Brower v. Harbeck*, 114
2. The transfer of such notes by the president alone, without a previous resolution of the board of directors, is valid, he being authorized by the by-laws to make contracts and transact the ordinary business of the Company. *id.*
3. And though such transfer amounts to over \$1,000, yet if made in and according to the ordinary course of its business, it cannot be avoided at the suit of a receiver subsequently appointed, notwithstanding the company was actually insolvent at the time, unless it was openly and notoriously insolvent, or the party to whom the transfer was made had notice of the insolvency. *id.*
4. The receiver of an insolvent corporation cannot impeach or disaffirm the

lawful and authorized acts of the corporation. *id.*

5. Where the party receiving notes discounts them, and at the request of the company pays a claim of its creditor, which was usurious but not known to the transferee to be so, the transfer to him is not thereby invalidated. *id.*
6. A transfer of property and effects of a company amounting to over \$1,000, can be lawfully made in and according to the ordinary course of its business without a previous resolution of the board of directors, viz. on the discount of a note, in payment of checks, or bills, or of debts, &c. *id.*
7. The denial of the jurisdiction of the superior court to enjoin the corporation of the city from making a particular grant by ordinance or otherwise, is a denial of the power of a court of equity of general jurisdiction, under any circumstances and upon any grounds, to restrain a municipal corporation in the exercise of its discretionary powers. *Davis v. Mayor, etc. of New York*, 451
8. There is no distinction between a municipal corporation and any other corporation aggregate, in respect to the power of a court of justice over its proceedings. *id.*
9. A municipal corporation cannot be excepted from the general provision in the constitution of the state which declares, that "All corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons." *id.*
10. A court of equity has no right to interfere with or control the exercise of a discretionary power, by substituting its own judgment for that of the party in whom the discretion is vested. *id.*
11. It will not interfere, therefore, when the discretion is exercised within its proper limits, for the purposes for which it was given, and from the motives by which those who gave the discretion meant that its exercise should be governed. *id.*
12. The court, however, is bound to in-

terfere whenever it has grounds for believing that its interference is necessary to prevent abuse, injustice, or oppression, the violation of a trust, or the consummation of a fraud. *id.*

13. *Hence*.—If the corporation of the city of New York has no power to grant to any person the privilege of establishing a railway in any of the public streets of the city; or, 2nd—such a railway, if established, would operate as an injurious monopoly; or, 3rd—would be a public nuisance; or, 4th—there are reasons for believing that the grant is about to be made from corrupt motives, the issuing of an injunction to forbid the grant, is not an interference with a legal discretion, but a proper and necessary exercise of jurisdiction. *id.*

14. *Held*.—Upon these grounds, that an injunction directed to the defendants, which commanded them not to grant to Jacob Sharp and others the privilege of constructing a railway in Broadway, was properly granted, and that those members of the common council, who, after the service of the injunction, had voted for an ordinance or resolution, making the grant that was prohibited, were guilty of a contempt for which they were liable to be attached. *id.*

15. Municipal corporations possess only such powers as are expressly granted, or are necessary to the exercise of those which are so granted. (Bosworth, J.) *id.*

16. Hence, in the appropriation of public funds or property their powers are limited, and when they attempt to make such an appropriation, for purposes not authorized by their charter or by positive law, their act, whether clothed with the form of legislation or not, is without authority and void. (Bosworth, J.) *id.*

17. When a discretion is confided to persons appointed by law or to a municipal corporation, a court of justice will not attempt to control its exercise. (Bosworth, J.) *id.*

18. But if those in whom discretionary powers are vested, threaten and are about to commit a gross abuse of

power to the injury and in fraud of the rights of individuals and of the public, there is no principle or decision that precludes the interference of a court to prevent the threatened injury. (Bosworth, J.) *id.*

See INJUNCTION, 1, 2, 3, 5, 6, 7, 8, 9, 10.

COSTS.

See PRACTICE, *Costs*.

COVENANT.

1. A general covenant of warranty in a conveyance of lands is not a covenant of title merely, and therefore in effect a covenant of seizin. *Blydenburgh v. Cotheal*, 176
2. In order to sustain an action for its breach an actual eviction or ouster must be averred and proved. *id.*
3. Construed as a covenant of title, it is not a covenant running with the land, and consequently no action for its breach could be maintained by an assignee. *id.*
4. Thus construed, the covenant is broken as soon as it is made, and is converted by its breach into a *chose in action* which is not assignable. *id.*
5. An eviction means actual dispossession, and consequently an averment in the complaint, that the plaintiff by force of a paramount title, was evicted from her own right and title, as not averring or implying a change of possession, was held to be bad upon its face. *id.*
6. When a covenant to transport goods, and deliver them at the place to which they are destined within a limited period, contains no exception, the obligation which it creates is absolute and unconditional. *Harmony v. Bingham*, 209
7. This construction is not barred by a subsequent covenant, that a certain deduction shall be made from the freight in the event of a delay in the delivery of the goods beyond the period limited. *id.*

8. Where the bill of lading contains a stipulation to deliver the goods in good order, "the dangers of the railroad, fire, leakage, and all unavoidable accidents excepted;" the exceptions relate exclusively to damages affecting the condition of the goods, and do not vary the obligation of the carrier to deliver them within the period limited by a separate covenant. *id.*
9. Hence, when the delivery of the goods is delayed beyond the time fixed by the covenant, the carrier cannot defend himself by showing that the delay was in fact occasioned by unavoidable accidents. *id.*
10. When there is a delay in the delivery of the goods and the stipulated reduction from the freight is not then made, but the agent having charge of the goods refuses to deliver them until the whole freight is paid, the payment thus exacted is to be regarded as compulsory, and creates no bar to a recovery of a sum as damages for the breach of the covenant, equal to the deduction that ought to have been made. *id.*
11. Covenants are alternative only when they give an election to the party bound by them to perform one or other of the acts to which they relate, so that his fulfilment of one covenant is a discharge from his obligation to perform the other. *id.*
12. Covenants to deliver goods within a certain time, and in case of a later delivery, to make a certain deduction from the price of transportation, are not alternative, since they give no election not to deliver the goods at all. The second covenant only fixes the measure of damages for the violation of the first. *id.*
13. The breach of a covenant need not be assigned in the exact words of the covenant. It is sufficient when the performance of the covenant in its true meaning and import is negatived by a necessary implication. *id.*
14. The defendant, in the assignment of a lease to the plaintiff, covenanted that "the assigned premises were free and clear of and from all former and other grants, bargains, and incumbrances whatsoever." The defendant, however, by a prior deed, had bargained, sold, and assigned to one Sloan the privilege to use a wall on the premises as a party wall of a building, to be erected during the whole unexpired term of the lease. *Giles v. Dugro*, 231
15. *Held*, that the conveyance so shown was not to be construed as a mere license to use the wall, but was an absolute and irrevocable grant creating a permanent encumbrance, and was therefore a breach of defendant's covenant with the plaintiff. *id.*
16. It appearing that Sloan, in the exercise of the privilege granted him, had actually used, and still used, the wall in question as the party wall of a building he had erected—*Held*, that these facts were a virtual eviction of the plaintiff, entitling him to more than nominal damages. *id.*
17. The rule of damages, when there is only a partial eviction, is, that a portion of the original consideration money can be recovered, bearing the same ratio to the whole consideration as the value of the land to which the title has failed bears to the value of the whole premises. *id.*
18. It not appearing that the damages found by the jury exceeded the proportionate sum to which the plaintiff was entitled, and no such question having been raised in the court below—*Held*, that the verdict could not be disturbed.
- Held*, that the allegation that the use by Sloan of the privilege granted to him occasioned no damage to the plaintiff's building, was no answer to the plaintiff's claim for damages. *id.*

See CONVEYANCE, 2.
LEASE, 10.

D

DAMAGES.

1. In an action for an injury to the person, the circumstances, condition in

life, and pursuits of the plaintiff may properly be given in evidence, in order to enable the jury to determine the extent of his actual damages. *Caldwell v. Murphy*, 233

2. For the same reason, an inquiry into the probable consequences of the injury, as transitory or permanent, is eminently proper. *id.*
3. When successive actions may be brought for a continuous wrong, the damages in each may be justly limited to those sustained by the plaintiff at its commencement. *id.*
4. But where for an injury to the person a single action only can be brought, the certain and probable consequences of the injury must of necessity be considered, in order to enable the jury to give to the plaintiff a full compensation. *id.*

See COVENANT, 17.
INJUNCTION, 22.
JUDGMENT, 4.
LEASE, 4, 5, 6, 7.

DEBTORS, JOINT,

Where a suit has been commenced against two persons as joint debtors, the process being served on only one of them, and the plaintiff has proceeded to judgment under the joint debtor act, and proceedings are subsequently instituted against both the defendants, under the act respecting attachments against absconding, concealed, and non-resident debtors, the cause of action, or demand in such proceedings, does not arise upon the judgment within the meaning of the statute (2 R. S. 3 §§ 1, 3, 4). *Oakley v. Aspinwall*, 1

DEED.

See CONVEYANCE,
COVENANT.

DIVORCE,

See HUSBAND AND WIFE.

DURESS.

1. There may be a duress of property as well as of the person, and a payment thus exacted can no more be treated as voluntary in the one case than in the other. *Harmony v. Bingham*, 209
2. As a general rule, when a bailee in the possession of perishable merchandise, exacts more than is due as the condition of its delivery to the owner, the money paid as the necessary means of obtaining the delivery may be recovered back, as a payment made under duress. *id.*

E

EVIDENCE.

See ACTION, 2, 5, 7, 9.
AGREEMENT, 7, 8.
BAILMENT, 5, 6.
BILLS OF EXCHANGE, 5, 7, 8.
EXCEPTIONS, 3 and 4.
OUSTER.
PRACTICE, 87.

EXCEPTIONS.

1. An exception to the whole charge of a judge to a jury is too broad, and therefore bad, if any part of the charge be correct. *Murray v. Smith*, 412
2. The case is not altered by making the exception to the whole charge "and each and every part thereof." *id.*
3. As a general rule, when improper evidence has been admitted upon a trial, and an exception duly taken, a new trial must be granted, if the evidence had any bearing upon the issue, and could possibly have had an influence upon the verdict. *id.*
4. But when the cause is before the court upon a case containing the whole evidence, although it may appear that improper evidence was admitted, the verdict will not be disturbed if the court is satisfied that substantial justice has been done, and

that excluding the improper evidence, the same verdict ought to have been and would have been given. *id.*

5. *Held*, by a majority of the court, that the same rule ought to be followed when the question arises upon a bill of exceptions, which purports to contain the whole evidence given upon the trial. *id.*

EXECUTION.

1. Where an execution debtor agrees with a deputy sheriff that on the latter relinquishing specific property at the time actually levied upon, other property, ordered by the debtor, on his receiving it, shall be substituted as the subject of the levy, the agreement is void. *Shelton v. Westervelt*, 109
2. Where such property is received by the debtor and substituted after the return day of the execution, the sheriff acquires no valid lien upon it, and a subsequent *bond fide* mortgagee of it will acquire a title good as against the sheriff. *id.*
3. Where property is substituted before the return day and levied upon, the levy is good, although the previous agreement for substituting it is void. *id.*
4. An execution is not void, for the reason that it is issued by an attorney, other than the one by whom the judgment was received; nor will it be set aside for irregularity on that ground alone. *Cook v. Dickerson*, 679

EXECUTORS AND ADMINISTRATORS.

See PRACTICE, 33, 34.

F

FRAUDS.

See PRACTICE, 18, 19.

FRAUDS, STATUTE OF.

1. Where any credit is given to the party applying for and obtaining property, the promise of a third person to see the debt thus contracted paid, is void by the statute of frauds, unless in writing and expressing the consideration. *Brown v. Bradshaw*, 199
2. The defendant before goods were delivered to his brother, told the plaintiff to let the latter have what he wanted and "he would be responsible for them," and the plaintiff therefore furnished defendant's brother goods, charging them to the defendant, and the defendant knew while the account was running, that his brother was buying goods in his name of the plaintiff, and made no objection to it. *Held* that a report of a referee finding that the goods were purchased by the defendant and on his exclusive credit, will not be set aside as against evidence. *Flanders v. Crolius*, 206
3. Such a contract is not one to pay the debt of a third person within the meaning of the statute of frauds. It is an absolute and original contract of the defendant to pay a debt contracted by himself personally, and is valid though not in writing. *id.*
4. *Seemle*, that a contract in writing to sell and deliver coal at a stipulated price, although signed by the vendor alone, is not void under the Statute of Frauds. *West v. Newton*, 277
5. Such a contract is mutual on its face, the price to be paid for the coal on its delivery being a sufficient consideration for the undertaking of the vendor to deliver it. *id.*

H

HABEAS CORPUS.

1. A Surrogate's Court is a court of record within the meaning of the Revised Statutes, relative to proceedings as for contempts to enforce civil remedies, &c.
It has, therefore, the same power as

other courts, to punish persons guilty of contempt, and issue attachments for that purpose. But it has no power to enforce by an attachment against the person an order for the payment of money, if the money may be collected under an execution.

It has, therefore, no power to compel, by such an attachment, the payment of money due from an executor or administrator to the estate.

Held, therefore, that the prisoner who was held under such an attachment must be discharged. *In the matter of J. W. Latson*, 696

2. A judge of the Superior Court, in allowing a habeas corpus, and in his proceedings under it, can only exercise the powers which were conferred by statute upon a Supreme Court Commissioner. He is, therefore, not clothed with the discretionary powers of a judge in equity, in relation to the disposition and custody of infants. *The People v. Rose Porter*, 709

3. A petition for a habeas corpus, addressed to a judge of the Superior Court, can only be founded upon the provisions of the general Habeas Corpus Act (2 R. S., § 1, art. 2, p. 183). *id.*

4. Hence the judge can only act in the cases which the statute enumerates, and can make no other final order or determination than that which the statute prescribes. *id.*

5. The reported cases in England are inapplicable. In all of those, the habeas corpus was a common law, not the statutory writ.

Distinctions between a common law and the statutory habeas corpus stated and explained. Critical examination of the adjudged cases in England and in this State.

Conclusions from this examination:—

1. That the basis of the common law, as well as of the statutory writ, is an illegal imprisonment or restraint, and, consequently, that when the restraint is disproved the jurisdiction ceases.

2. That when the restraint is adjudged to be illegal, the only order that can properly be made, is to discharge the person imprisoned or restrained.

And lastly, That the exception of infants, of such tender years as to be in-

capable of making a choice, is more apparent than real. *id.*

6. The Habeas Corpus Act, in its revised form, is greatly enlarged in its provisions, and improved in its details; but its sole basis still is, an illegal imprisonment or restraint, and the only authority of an officer acting under it, to discharge, bail, or remand the person on whose behalf the habeas corpus is issued. *id.*

7. It appearing, in this case, that the child, on whose behalf the writ was issued, was not restrained of her liberty, *held*, that the judge could only declare that she was at liberty to go where she pleased, and could make no order for her delivery to her father. *id.*

HUSBAND AND WIFE.

See PRACTICE, 14.

I

INFANTS.

1. When at the time of the sale of mortgaged premises under a decree of foreclosure, the equity of redemption therein is owned by a minor, and a surplus arises from the sale, his interest therein is deemed real estate, and will be disposed of as such at his death, if he dies under age. *Swozey v. Thayer*, 286

2. Such surplus will not be converted into personalty, even when it has been invested by the court in personal securities for the benefit of the infant. *id.*

3. When an infant's real estate is converted into money for a particular purpose, the whole surplus, after satisfying such purpose, will be regarded as land. *id.*

4. The law will not allow a conversion thus produced to have the effect of altering his power of disposition over the property, so as to enable him to

- dispose of it as money, where he could not as land. *id.*
5. The court will so control the proceeds until he becomes of age, that he may take it as money or land, as he may then elect. *id.*
6. If he dies under age it will be subject to the same law of succession, as the property which produced it. *id.*
7. The Supreme Court, as succeeding to the entire jurisdiction of the Court of Chancery, is the general guardian of infants. As such, it has an exclusive right to determine all questions relating to their disposition and custody, except where those questions arise in a suit for an absolute or limited divorce. *The People v. Rose Porter*, 709
6. The service thus made is sufficient and effectual, as to every member of the corporate body whose personal action, as such, the injunction is designed to control. *id.*
7. When the injunction forbids the performance of a corporate act, it is violated by every member of the corporate body, by whose assent or co-operation, the act so forbidden is performed. *id.*
8. Every such member is, therefore, individually guilty of a contempt, for which as an individual he may be justly punished. *id.*
9. An injunction which forbids a corporation to make a particular grant, which it describes, is violated by the passage of an ordinance, or resolution, as a corporate act, which by its terms is meant to operate as the grant which is prohibited. *id.*

INJUNCTION.

1. When an injunction is directed to a corporation, it is operative and binding, not only upon the corporation itself, but upon every person whose personal action, as a member or officer of the corporate body, it seeks to restrain or control. *Davis v. Mayor, etc. of New York*, 451
2. Every such person is as fully bound to personal obedience, as if personally named in the process, and, consequently, is just as liable for his disobedience. *id.*
3. Upon any other construction, an injunction addressed exclusively to a corporation, would be a nugatory and senseless proceeding. *id.*
4. *Quere*: Whether the omission to serve with an injunction, a copy of the affidavit upon which it was issued, is such an irregularity as releases the party, upon whom the service is made, from the duty of obedience? *id.*
5. The service of a copy of the sworn complaint or other affidavit upon which an injunction, directed to a municipal corporation, is founded, is properly made upon the mayor, as the chief officer, and for that purpose, the representative of the whole corporation. *id.*
10. Every member, therefore, of the corporate body who votes for the adoption of such an ordinance, with the intent that it shall become operative and effectual as a grant, commits a breach of the injunction, and, if the process is valid, is guilty of a contempt. *id.*
11. The only defence that can be set up in such a case is, that the injunction upon its face was null and void, from the entire want of jurisdiction in the court by which it was issued. *id.*
12. No such want of jurisdiction can be alleged to exist where the injunction imposes a command, which the court, under any circumstances and upon any grounds, might rightfully address to the corporation and its members. *id.*
13. When the jurisdiction exists, although the allegations in the complaint may be wholly insufficient to warrant its exercise, the injunction must be obeyed. *id.*
14. This insufficiency is evidence of a want of equity in the complaint for which the injunction may be dissolved, but is no evidence of a want of jurisdiction, rendering the process void and justifying disobedience. *id.*

15. When a judge who grants an injunction decides erroneously upon the facts alleged in the complaint, his error has no bearing upon the question of his jurisdiction. (Bosworth, J.) *id.*

16. The proper course, in such a case, of a defendant upon whom the injunction has been served, is to move for its dissolution, but so long as it exists he is bound to obey it. (Bosworth, J.) *id.*

17. As a corporation acts only through its officers and agents, it is only by them that an injunction directed to the corporation can be violated. (Bosworth, J.) *id.*

18. Hence, every such officer or agent is bound by the injunction, and when he performs knowingly the act which is prohibited, is chargeable with all the consequences of wilful disobedience. (Bosworth, J.) *id.*

19. Unless the officers who thus violate the injunction can be punished, there can be no penalty whatever, and every injunction directed to a municipal corporation may be violated with impunity. (Bosworth, J.) *id.*

20. It would be absurd to sequester the property of the corporation, since this would be to inflict an injury upon the citizens whose rights are violated or endangered, and would, in effect, be punishing the aggrieved and not the guilty party. (Bosworth, J.) *id.*

21. The court will relieve a tenant, upon equitable terms, against whom a judgment of dispossession, under the act authorizing summary proceedings to recover the possession of land, had been obtained by surprise. In such a case an injunction restraining the landlord from executing a warrant of dispossession will be granted upon the payment into court, by the tenant, of the rent claimed to be due. *Forrester v. Wilson*, 624

22. Counsel fees for defending the suit, and moving to dissolve an injunction, may be properly included in an estimate of the damages sustained by the defendant, in consequence of the injunction. *Coates v. Coates*, 664

See PRACTICE, 67, 68, 69.

INSURANCE, MARINE.

1. The words of the general clause in a policy of insurance do not cover all losses that may happen to the property insured during the pendency of the risks. *Moses v. Sun Mut. Ins. Co.*, 159

2. They are restricted to losses of a similar nature, and resulting from similar causes as those specially enumerated. *id.*

3. Hence they do not cover a loss resulting from the consumption of cargo by the crew or passengers, or from a sale to defray the expenses of necessary repairs. *id.*

4. It is the duty of the ship-owner to provide funds to meet all contingent necessary expenses at each port of destination, and if he fail to do so, he alone is responsible to the shipper for a loss resulting from his neglect. *id.*

5. The sea-worthiness of the ship is a condition precedent to the attaching of the policy; hence some proof of its fulfilment must, in all cases, be given, in the first instance, by the assured. Its fulfilment is not a presumption of law casting the burden of proof upon the underwriter. *id.*

INSURANCE, FIRE.

1. When it is provided by the conditions annexed to a policy of insurance against fire, that the company shall not be liable "for any loss occasioned by the explosion of a steam boiler, or explosions arising from any other cause, unless specially specified in the policy," although fire may be the proximate cause of the loss that is claimed, the company is not liable, when it appears that the fire was directly and wholly occasioned by an explosion. *St. John v. Am. Mut. F. & M. Ins. Co.*, 371

2. The exception meant to be created, if otherwise construed, would be senseless and nugatory, since the company, under the general words of the policy,

could never be made responsible for a loss occasioned wholly by an explosion, without any immediate action of fire upon the property insured. *id.*

3. When "fire" is the only risk insured against, an insurance company can only be liable, when "fire" is the proximate cause of the loss, and the object of the conditions annexed to the policy is to create exceptions from this liability. *id.*

4. When a loss by fire is proved which is not excepted, it is no defence to the company that the fire was occasioned by the fault or neglect, without fraud, of the assured or his servants. *id.*

INTEREST.

1. When a bond is conditioned for the payment of a sum certain and no time of payment is specified, the debt is due immediately without demand, and bears interest from the date of the bond. *Purdy v. Phillips*, 369

J

JUDGMENT.

1. Although before the Code a judgment could not be impeached in an action at law upon the ground that it had been obtained by fraud, yet it was liable upon that ground to be impeached and set aside in a Court of Equity, and since the Code, the same facts that would formerly have entitled a defendant to be relieved in equity, may be set up in his answer as a full defence, the distinction between legal and equitable defences being wholly and wisely abolished. *Dobson v. Pearce*, 143

2. *Held*, that the Supreme Court of Connecticut, acting as a Court of Equity, had the same jurisdiction, under the Constitution of the United States, to enjoin a suit upon the judgment, as the Court of Chancery in this State. And,

That the record of the proceedings in Connecticut being properly authenticated, ought to have been admitted

as conclusive evidence of the truth of the facts upon which the judgment of the Court was founded. *id.*

3. It is not competent for an appellate court to alter a judgment given in the court below, when the party by his omission to appeal has precluded himself from denying its justice or propriety. An appellate court may in some cases modify or reverse in part a judgment or decree, but only when such modification or reversal is necessary to render the decree as finally pronounced entirely consistent. *Bell v. Holford*, 58

4. Where, in an action for a tort against several defendants, the jury have severed the damages, a judgment entered against all for the highest damages will not be set aside as irregular, but the defendants will be left to their remedy by appeal. *Bulkley v. Smith*, 643

5. A judgment is not void, merely because the roll does not contain a copy of the verdict. Nor is it void when two defendants answer separately by different attorneys, and obtain a verdict, and a bill of costs is allowed to each attorney, merely because the judgment is entered in favor of the defendants jointly for the aggregate of such costs. A judgment will not be set aside for irregularity, if the motion is not made within a year after it is rendered. *Cook v. Dickerson*, 679

JURISDICTION.

The equitable powers of the Superior Court can only be exercised in those actions and proceedings which its jurisdiction, as defined by the Code, properly embraces. *The People v. Ross Porter*, 709

See INJUNCTION, 11, 12, 13, 14.
PRACTICE, 4-20

L

LANDLORD AND TENANT.

1. Gas fixtures and sitting stools, when

placed by a tenant in a shop or store, although fastened to the building, are not fixtures, as between the tenant and landlord. *Lawrence v. Kemp*, 363

2. They are the property of the tenant, and may be removed by him not only during the term but after its expiration. He may pass a title to them by a chattel mortgage, and they may be levied on under an execution against him as his personal property. *id.*
3. When a subsequent tenant in possession of a store containing such articles, the property of a former tenant, is sued by the landlord for not delivering them to him at the expiration of his term, he may defend himself by showing that they had been mortgaged by the first tenant, and that the mortgagee had entered and removed them. *id.*
4. Even when such subsequent tenant had bound himself by an agreement in writing to deliver the articles to the landlord at the expiration of his term, he is liable only for nominal damages, when he proves a paramount title in the mortgagee by whom they were removed. *id.*

See LEASE.

LEASE.

1. The plaintiff demised to defendant by lease, under seal signed by both parties dated February 8d, 1849, certain premises for one year thereafter, at \$700 per annum, payable quarterly in advance. The action was for the last quarter's rent. The defence was a surrender by operation of law prior to 1st of February, 1850, and also an eviction during the last quarter in March, 1850, by summary proceedings at the instance of the plaintiff. *Whitney v. Meyers*, 266
2. *Held*, 1st That an absolute and unconditional lease by parol during the term, of the whole premises, to a new tenant, occupation and payment of rent by such new tenant pursuant thereto, would work a surrender by operation of law. 2d. That a parol lease for less than a year would be valid in law and effectual to vest an

estate for the agreed term in the new tenant: that there was no evidence on which to submit to the jury the question of a surrender. 3d. That where rent is payable quarterly in advance, an eviction during the quarter, but after the rent becomes due, does not bar an action for the rent. The most the evicted tenant can equitably claim is a deduction for so much of the quarter as elapses after his eviction. *id.*

3. The defendant was the owner in fee of premises at the foot of Barclay street, in the city of New York, in which was an office known as "The Troy Day Boat Office," and which had then been standing there for the period of twenty years. On the 1st of May, 1850, he leased the office to one Ross, for one year, for \$500, payable monthly in advance. Ross went into possession and occupied until the 1st of September, 1850, when the plaintiff was accepted by the defendant as his tenant, from that date to the 15th of November then next, on condition of his punctually paying rent as stipulated to be paid by Ross. On the 3d of September, 1850, the plaintiff, as such substituted tenant, paid to, and the defendant received, \$41 62, in full of the rent for the month of September, in advance. On the morning of the 7th of September, 1850, the office was torn down by the Street Inspector of the city, under the authority claimed to be derived from 2 R. L. p. 434, § 220, and p. 434 *id.* § 227, and a corporation ordinance, found at page 288, § 1, of the edition of 1845. The plaintiff brought this action, claiming to receive so much of the rent paid in advance, as would be payable for the part of the month of which he had been deprived of the occupation, and also the value of his bargain, or the difference between the value of the lease and the rent stipulated to be paid. The lease contained no covenant, and there was no fraud or misrepresentation on the part of the defendant. It was held, that if the destruction of the office was unauthorized by law, that act was a trespass, and would not exonerate the plaintiff from his liability to pay the stipulated rent. If authorized by law; the existence of the authority, and the probability of its

being exercised, were presumptively as well known to the one as the other.
Noyes v. Anderson, 342

4. That the recovery must be limited to so much of the advance rent as was proportioned to the part of the month, during which the plaintiff was deprived of the use and occupation of the office. The recovery of this much was allowed on the principle that to this extent there had been a failure of consideration, the lease having been given and taken in the mutual expectation that the plaintiff would not be disturbed in the enjoyment of the premises by any action of the corporation during the term. *id.*

6. That in the case of an eviction from demised premises, where there was no fraud or misrepresentation of the lessee inducing the taking of the lease, the measure of damages, if rent has been paid in advance, is so much of the advanced moneys as would be payable at the stipulated rate, for the unexpired part of the lease, with interest, and that if no rent had been paid in advance, no damages could be recovered by the lessee. His liability to pay rent would cease from the time of the eviction. *id.*

6. Upon an executory contract to give a lease, and a failure or refusal to give one, the rule of damages is the same, if the inability or refusal is without any fault or fraud on the part of the party promising to execute it. *id.*

7. Where the refusal to give a lease results from the fraudulent conduct of the defendant, consequent special damages, on proper allegations being embodied in the complaint, may be recovered. *id.*

8. The plaintiffs, on the 31st of February, 1851, agreed, for a valuable consideration, to transfer to the defendant Green, a lease, then held by them, of the store, No. 1, Astor House, for the term of five years, from the 1st of May, 1849, and to sell to him the furniture, fixtures, and goods in the store, and the good will thereof. The agreement secured to S. Beman and his wife, and her representatives, free and uninterrupted access to the store, from its date, until the 1st of May

following, in order to receive her customers; and for that purpose a counter in the store, described in the agreement, was assigned to her use. On the 10th of February, the price to be paid by Green having been settled by the parties at \$2,708 44, Beman, in consideration of the payment of that sum by a bill of sale, duly executed, transferred, and conveyed to Green his lease of the store, and all the stock in trade, and fixtures therein; but in this instrument the reservation contained in the agreement was omitted. On the 11th of February Green surrendered the lease assigned to him, and took from the landlord a new lease in his own name, for the term of three years and three months, from the 1st of February, 1851. *Beman v. Green*, 382

9. *Held*, that the plaintiff, under the agreement, had a legal right to continue in the occupation of the store in the manner and for the time therein expressed.

Held, that this right was not divested by the bill of sale, which was meant *pro tanto* to carry the agreement into effect, and not to deprive the plaintiffs of any of the benefits it secured to them. The two instruments were to be construed together as one transaction.

Held, also, that the rights of the plaintiffs were not affected by Green's surrender of the lease assigned to him, and the terms of the new lease which he then obtained. *id.*

10. When the breach of a covenant in a lease, not to underlet without the consent of the landlord, is alleged, if the fact of underletting is proved or admitted, it is matter of defence, that the consent of the landlord was given, and the burden of proof is cast upon the defendant. *Lawrence v. Williams*, 585

11. Where the lease contains a clause of re-entry for the breach of any covenant by the lessee, in an action, by the landlord, to recover possession of the demised premises, it is not necessary to prove an actual entry, before the commencement of the suit. *id.*

12. Section 25 in the title in the R. S.

"Of the action of ejectment," dispenses with the necessity of such proof, in all cases whatever.

That section, as it relates not to the form of the action, nor to the nature of the proof to be given on the trial, is one of those general provisions which have not been repealed by the Code. *id.*

LIEN.

A contractor, who under the provisions of his contract with the legal owner, has an equitable title to the house which he is building, is to be deemed the owner, under the Mechanics' Lien Act of 1851. *Belmont v. Smith*, 675

See ACTION, 3.

M

MARRIAGE AND DIVORCE

See HUSBAND AND WIFE.

MORTGAGE.

See LANDLORD AND TENANT, 2, 3, 4.

MUNICIPAL CORPORATION.

See CORPORATION.
NUISANCE, 2.

MUTUAL INSURANCE COMPANY.

See CORPORATION.

N

NEGLIGENCE

See COMMON CARRIERS.
PRACTICE, 22.

NEW TRIAL

See PRACTICE, Trial.

NUISANCE

1. The court will not restrain the erection and continuance of a lamp-post and lamp in front of or near a dwelling-house, upon the ground that it is a nuisance to the owner or inhabitants, unless the fact that it is so is clearly established by the proofs. *Parsons v. Travis*, 439
2. Whether such an erection shall be permitted or continued, rests in the discretion of the corporation of the city, and when no special injury is shown, the court has no right to restrain the exercise of this discretion. *id.*

O

OUSTER.

1. It is sufficient evidence of an ouster in an action brought by a tenant in common to recover the possession of his share of lands in the possession of the defendant, that the original entry of the defendant was hostile to the plaintiff's rights, and the possession that followed exclusive and adverse. *Olson v. Rankin*, 337
2. It is a presumption of law that the possession of the defendant retained its original character, and this presumption, in respect to the plaintiff, was held not to be repelled by the fact that the defendant had obtained a lease from the other tenants in common covering their respective shares. *id.*
3. *Semble*, that the denial in the defendant's answer of all right or title in the plaintiff was equal to a confession of ouster, superseding the necessity of proof upon the trial. *id.*

P

PARTNERSHIP.

A solvent partner is not entitled by law to the sole administration of the as-

sets of the partnership, which is dissolved by the separate insolvency of one or more of the partners. *Hubbard v. Guild*, 662

See PRACTICE, 17.

PAYMENT.

See SALES, 12, 13, 14, 15.
STOCK.

PLEADING.

1. In pleading the statute of frauds, an express reference to the statute by its title or otherwise is not necessary. It is sufficient to set forth the facts which render its provisions applicable. *Goolet v. Cowdrey*, 132
2. When usury is specially pleaded, the proof must correspond, in all respects, with the allegations in the answer. If there is any variance, the defence must be overruled. *Catlin v. Gunter* 253
3. The court will not amend an answer after a trial so as to let in the defence of usury against a holder, for value and without notice, of negotiable paper. *id.*
4. When the execution of a promissory note, and its possession by the plaintiff as an endorsee, are admitted, a denial that he is the lawful owner, without averring a title in any other person, is irrelevant and frivolous. *id.*
5. Under the Code, there is no general issue under which facts, in their nature constituting a defence, but not averred in the answer, may be given in evidence. *id.*
6. Facts, tending to prove that a promissory note, or any other contract, was void in its origin, on the ground of usury, fraud, &c., are in their nature as certainly matter of defence, as facts barring the action which subsequently arose. There exists, therefore, the same necessity for averring them in the answer. *id.*
7. In an action for slander of title, whereby the plaintiff was prevented

from obtaining a loan on the mortgage of the property, or from selling it, it is essential to stating a cause of action, to name the person or persons who refused, for that cause, to loan or purchase. If not named, the complaint is demurrable. *Linden v. Graham*, 670

See PRACTICE, 29, 30, 31.
DEMURRER.

PRACTICE.

Amendment.
Answer.
Appeal.
Arrest.
Attachment.
Bail.
Bill of Exceptions.
Bill of Particulars.
Complaint.
Costs.
Demurrer.
Discovery.
Execution.
Filing.
Injunction.
Inquest.
Judgment.
Motions.
Proceedings Supplementary to Execution.
Reference.
Remittitur.
Submission of a Controversy.

Amendment.

1. An order directing a complaint to be amended in certain particulars does not preclude the plaintiff from serving an amended complaint, containing new and material allegations, provided the time for amending, as of course, has not expired. *Jeroliman v. Cohen*, 629
2. The complaint, however, so amended, must not contain any matter that by the prior order was directed to be stricken out. *id.*
3. But *semble* that, when an amended complaint has been served in conformity to an order, it cannot be again amended without leave of the court, although the time for amending, as of course, may not have expired. *id.*

See **BILLS OF EXCHANGE**, 6.

Answer.

4. A denial of the jurisdiction of the court, in an answer, must show, that the court had no jurisdiction when the suit was commenced. Hence, in an action against joint debtors, commenced before the amended Code of 1851 was in force, an answer denying the jurisdiction of the court, upon the ground, that one of the defendants was a non-resident, and that the summons had not been served upon him, was bad, as showing not an original want of jurisdiction, but only that all the necessary parties were not yet before the court. *Bridge v. Payson*, 613

5. A defendant is not bound, in his answer, to set up a demand, which from its nature is a proper subject of a counter claim.

He may elect to enforce its recovery in a separate suit.

A defendant has at all times had such an election, in relation to a set-off, or a recoupment of damages, and his rights, in this respect, have not been varied or affected by the Code, §§ 149, 150. *Halsey v. Carter*, 669

6. Where a defendant, in his answer, has stated *nothing* on information and belief, his affidavit, that his answer is *true to his knowledge*, without adding the words "except as to the matters therein stated upon information and belief, and that as to those matters he believes it to be true," is a sufficient and proper verification. *Kincaid v. Kipp*, 692

7. One defendant cannot swear to the want of sufficient information to form a belief on the part of a co-defendant.

id.

Appeal.

8. The dismissal by the Court of Appeals of an appeal for want of prosecution, is not, in judgment of law, an affirmance of the judgment appealed from. *Watson v. Husson*, 242

9. Hence in an action for a breach of the undertaking given on the appeal, an averment in the complaint that the judgment was affirmed is not sustained

by the admission or proof that the appeal was dismissed. *id.*

10. The undertaking which the Code requires upon an appeal from the terms in which it is expressed, cannot be construed as broadly as the bond which the R. S. required to be given on bringing a writ of error. *id.*

11. It is limited to the affirmance of the judgment, and a judgment is not affirmed until the appellate court, upon an examination of its merits, has by a proper sentence declared its validity. *id.*

12. Although no security is required upon an appeal from an order, yet such an appeal does not operate as a stay of proceedings—when a stay is desired, until the determination of the appeal, it must be obtained by a special order. *Bacon v. Reading*, 622

13. Under the Code, an appeal from a judgment, though accompanied with a proper undertaking for the payment of the judgment, and the costs of the appeal, does not *per se* supersede an execution previously levied on personal property. The language of the Code, as to the effect of such an appeal, is identical with that of the Revised Statutes, relative to the effect of an appeal from a decree of the Court of Chancery. An appeal from the latter, and the giving such security, were decided by that court not to operate as a supersedeas. *Cook v. Dickerson*, 679

See **JUDGMENT**, 3.
PRACTICE, 32.

Arrest.

14. In action against husband and wife, for a tort committed by the wife, neither can be arrested. *Anonymous*, 613

15. A defendant who has been arrested under an order in an action upon contract, and has not been bailed, may move to vacate the order at any time, before he has been charged in execution. *Wilmerding v. Moore*, 645

16. The undertaking to warrant an order of arrest must in all cases be executed by the plaintiff, except where

- the plaintiff is a *feme covert*, or an infant. *Richardson v. Craig*, 666
17. A partner cannot arrest a co-partner upon the allegation of a fraudulent removal of partnership property. *Cary v. Williams*, 667
18. *Sembla*,—That when an assignment made by a debtor, of all his property, for the purpose of satisfying particular debts, contains no provision relative to a possible surplus, the omission is not such evidence of an intent to defraud his creditors as will be deemed sufficient to warrant his arrest. *Spies v. Joel*, 669
19. If the omission is, upon such an application, evidence at all, it is a presumption only that it raises, and this presumption is conclusively rebutted by showing that the preferred debts exceeded the value of the property. *id.*
- Attachment.*
20. When in an action against joint debtors the Superior Court has acquired jurisdiction by the service of the summons upon one of the defendants, the property of any other defendant, who is a non-resident, may be attached under § 227 of the Code. *Anon.*, 662
- Bail.*
21. The Court may in the exercise of its discretion exonerate bail after the lapse of more than 20 days from the commencement of the suit against them. *Gilbert v. Bulkley*, 668
- Bill of Exceptions.*
- See EXCEPTIONS, *Ante*.
- Bill of Particulars.*
22. In an action under the statute, by the representatives of a deceased person, deprived of life through the alleged negligence of the defendants, to recover the damages occasioned by his death to his widow and children, a bill of particulars cannot properly be required. *Murphy v. Kipp & Brown*, 659
23. It would be unreasonable to require the plaintiff in such actions, to state by anticipation all the items, and the amount of each, that the court might hold would properly enter into the computation of damages. *id.*
24. The alleged disposition of ordinary jurors, to give extravagant damages in such cases, is not a sufficient reason for granting a struck jury. *id.*
25. As the damages, in such cases, are limited to the pecuniary loss, when, in the judgment of the court, they exceed any reasonable estimate of such loss, the verdict will be set aside. *id.*
- Complaint.*
26. The words, "any instrument for the payment of money only," in § 152 of the Code of 1851, mean an instrument which, on its face, is evidence of the debt which is claimed to be due. *Alder v. Bloomingdale*, 601
27. *Hence*, when not only the instrument itself, but extrinsic facts, are necessary to be proved to enable the plaintiff to recover, the existence of these facts, as constituting in part the cause of action, must be averred in the complaint. *id.*
28. A promissory note, in a suit against an endorser, is not an instrument for the payment of money only, since, to enable the holder to recover, a regular demand of payment and notice of refusal are necessary to be proved. *id.*
29. *Hence*, a complaint against an endorser containing no averment of these facts, is bad upon demurrer. *id.*
30. A complaint seeking damages for the breach of an agreement, may also require, that an agreement in writing, relating to the same transaction, which the plaintiff was induced to sign by fraud, may be reformed, so as to correspond with the agreement set forth, of which the breach is alleged. *Jeroliman v. Cohen*, 629
31. It is no objection, that the reformation of a written contract is a matter purely of equitable cognizance, since,

under § 169 of the Code, as last amended, legal and equitable causes of action, when they arise out of the same transaction, may be united. *id.*

Costs.

32. On a demurrer to a bill in equity in the Supreme Court, that court gave judgment for the plaintiff, overruling the demurrer with costs. This court reversed that judgment. The Court of Appeals reversed the judgment of this court, and affirmed that of the Supreme Court at special term, "with costs." The words "with costs" in the judgment of the appellate court, does not, in such a case, mean the costs of that court, but of the court below. *Bogardus v. Rosendale Manfg. Co.*, 592
33. Security for costs cannot be required of an executor, administrator, or trustee, under § 317 of the Code, as amended in the session of 1852, merely upon the ground that the estate which he represents is insolvent. *Darby, Admr. etc. v. Condit*, 599
34. The power given to the court of requiring security from an executor, &c., is strictly discretionary. *id.*
35. Where the claim of title to real property arises on the pleadings, and the plaintiff recovers a verdict, he is entitled to costs of course. *Niles v. Lindsley*, 610
36. If the defendant puts the title in issue and compels the plaintiff to prepare to prove it, he cannot relieve himself from the liability, by admitting the title on the trial. *id.*
37. The only evidence that can be received as to whether or not "the title came in question at the trial," is the certificate of the judge who tried the cause. *id.*
38. Suits commenced before the Code are excepted from the repeal of all former statutes in relation to costs. *Rich v. Husson*, 617
39. In such suits the right to costs, and the amount to be recovered, depend upon the statutory provisions in force when the Code was enacted—except in relation to those subsequent proceedings to which the Code may apply. *id.*
40. A proceeding in a suit means an act necessary to be done to attain a given end, and the definition neither includes the right to recover costs nor the amount to be recovered. *id.*
41. The plaintiff, in an action commenced before the Code, having obtained a verdict for \$50 only, held that the defendant, under the R. S., was entitled to recover costs. *id.*
42. Held, also, that no judgment for the defendant for his costs, having been entered by the direction of the judge who tried the cause, or by the court, the judgment entered was irregular. *id.*
43. Upon an appeal from an order overruling a demurrer only \$10 costs can be given. *Drummond v. Husson*, 638
44. Where a verdict is taken subject to the opinion of court at general term upon questions of law, and judgment in the meantime is suspended, if judgment is rendered upon the verdict, the prevailing party is not entitled to costs, as upon an appeal from a judgment at special term. *Roosevelt v. Brown*, 642
45. Term fees not allowed for subsequent terms after a cause has been referred. 651
46. The items of costs, as adjusted by the clerk, and the affidavit of disbursements, must be filed, but not incorporated in the roll; they form no part of it. *Cook v. Dickerson*, 679
47. When a complaint sets up a note and account, and the defendant, after setting up a counter-claim in his answer, serves an offer that the plaintiff may take judgment for a sum named, and the plaintiff recovers a verdict less in amount than the sum offered, with interest from the time of the offer to the date of the verdict, he must pay defendant's costs from

- the time of the offer. *Schneider v. Jacobi*, 694
48. An offer, made in that stage of the cause, its acceptance, and entry of judgment thereon, extinguish the counter-claim. *id.*
49. The provisions of the R. S. relative to the allowance of costs to defendants are repealed. *Bulkeley v. Smith*, 704
50. In actions for a malicious prosecution against several defendants, the allowance of costs to a defendant, who has answered separately and is acquitted upon the trial, rests wholly in the discretion of the court. *id.*
51. It is not imperative on the court to make an order compelling a non-resident plaintiff to file security for costs. *Florence v. Bulkeley*, 705
52. When the application is not made until the cause has been referred and noticed for hearing, it will be denied, as unreasonably delayed. *id.*
53. For the same reason, an application on the part of the plaintiff, which otherwise would have been granted, to be allowed to prosecute *in forma pauperis*, will be denied. *id.*
- Demurrer.*
54. Mere irrelevancy in an answer is not a ground of demurrer.
When an answer containing irrelevant matter is demurred to, if it contain a valid defence which may be separated from the irrelevant matter, the demurrer must be overruled. *Watson v. Husson*, 242
55. The Code, as amended in 1852, has not substituted an order for a judgment in all cases where a demurrer is sustained or overruled. *Drummond v. Husson*, 683
56. The decision is still a judgment, where a demurrer to the whole pleading is sustained. It is an order where the demurrer is partial. *id.*
57. A demurrer, since the Code was amended in April, 1852, cannot be interposed to new matter in an answer, unless such new matter constitutes a counter-claim. *Quin v. Chambers*, 673
58. Any new matter set up as a defence, and not constituting a counter-claim, if it do not state facts sufficient to constitute a defence, may be stricken out as irrelevant, or, if the whole answer consist of such matter, judgment may be granted on account of the frivolousness of the answer. *id.*
59. When plaintiffs sue in a name which is appropriate to a corporate body, it is not necessary to aver in the complaint that they are a corporation.
A demurrer to the complaint on the ground that it contains no such averment will be adjudged frivolous.
When the want of a legal capacity to sue does not appear on the face of the complaint, the objection must be taken in an answer; it cannot be raised by a demurrer. *Union Mutual Ins. Co. v. Osgood et al.* 707
- See ACTION, 8.
- Discovery.*
60. The provisions of the Revised Statutes in relation to a discovery of books, papers, &c., have not been superseded by § 388 [sec. 341 and 342] of the Code. The two systems may stand together, as not being inconsistent with each other, either as to the mode of making a discovery, or the powers of the court, if a discovery be refused. *Hoyt v. Am. Ex. Bank*, 652
61. If in answer to an order for discovery and inspection, or for sworn copies of books, papers, &c., the opposite party denies fully and explicitly that there are any such entries, books, or papers under his control, that is an end of the application. He cannot be subjected to a fishing examination. *id.*
62. The court has no right, under the rules adopted, to execute the power conferred by the Revised Statutes, or under the Code, to direct a discovery to be made by appointing a referee to ascertain and report, whether an order directing a discovery previously made and executed, has been fully

complied with; and that the referee have power to examine and personally inspect all the books, papers, and documents, &c., and to examine witnesses in relation thereto, &c. *id.*

63. On the return being made to the first order, the petitioner, if he deems it insufficient, should apply for an order that the opposite party show cause at a certain time why the particular deficiencies or omissions alleged should not be supplied. *id.*

64. Where no complaint has been filed, and the nature of the relief sought by the action is not shown by affidavit, the merits of the case cannot appear, and the court in its discretion should not compel the production of books. *Keeler v. Dusenbury*, 660

Execution.

See EXECUTION, *Ante.*

Filing.

65. Where a deposition taken *de bene esse* is not filed within ten days, as directed by the statute, the court may order it to be filed *nunc pro tunc*. *Burdell v. Burdell*, 625

Injunction.

See INJUNCTION, *Ante.*

Inquest.

66. An inquest cannot be regularly taken on the first day of a trial term, unless the action is regularly called upon the calendar. *Smith v. Brown*, 665

Judgment.

See JUDGMENT, *Ante.*

Motions.

67. Upon a motion to dissolve an injunction, granted during the pendency of an action under the last clause of § 219 of the Code, the only question
D.—I.

to be considered is that of fraudulent intent. *Brewster v. Hodges*, 609

68. Affidavits denying the debts sworn to by the plaintiff cannot properly be received. *id.*

69. The effect of the temporary injunction that can alone be properly granted in such a case, is not to restrain any removal or disposition whatever of the defendants' property, but only such a removal or disposition with the intent to defraud creditors. *id.*

70. A defendant may, in all cases, move for a dismissal of the complaint, where the plaintiff neglects to bring the cause to trial according to the course and practice of the court, without being himself bound to notice the cause for trial. *Roy v. Thompson*, 636

71. A motion to strike out an entire answer as frivolous is irregular. The proper motion is for judgment under § 247 of the Code. Under the former practice sham and frivolous answers were frequently confounded, but they are carefully distinguished by the Code. The distinction is that which is stated in *Brown v. Jenison* (3 Sand. S. C. R. 732). *Hull v. Smith*, 649

72. When one only of two or more defenses in an answer is alleged to be frivolous, if it is also irrelevant or redundant, it may be struck out under § 160; but when it is merely frivolous the plaintiff is put to his demurrer. *id.*

73. A notice of a motion cannot be so countermanded by the party who has given it, as to deprive the opposite party of the right of attending on the day specified and having the motion dismissed with costs. *Bates v. Jaines*, 668

Proceedings Supplementary to Execution.

74. The judgment debtor may be cross-examined. *Leroy v. Halsey*, 589

75. Under § 292 of the Code, a judgment debtor, residing out of the city and county of New York, cannot be required to appear before a judge of the Superior Court to be examined

concerning his property, after the return of an execution unsatisfied, notwithstanding the judgment was recovered in that court. In such a case, the order can only be made by a county judge of the county where the debtor resides, after an execution has been issued to that county and returned unsatisfied; and the order must require the debtor to appear in the latter county. *Hersenheim v. Hooper*, 594

76. Where, on examination, supplementary to execution, it appeared that the judgment debtor was a public carman, was a house-holder, and had a family for which he provided, and had "one horse, a harness, and cart," held that they were exempt from execution, and came within the definition of the word *team*, as used in the act of 1842, ch. 157. *Harthouse v. Rikers*, 606

77. In proceedings supplementary to an execution, an order, restraining a third person from disposing of property of the debtor, cannot be made until such person has been made a party to the proceeding. *King v. Tuska*, 635

Reference.

78. When a Referee reports that nothing is due to the plaintiff, and it appears from his report that the case had not been heard before him, but that his decision was founded upon the default in appearance of the plaintiff and his counsel on the day appointed for a hearing,—the proper judgment to be entered is a dismissal of the complaint, not an absolute judgment, as upon a verdict. The judgment ought no more to be an absolute bar in such a case, than in that of a nonsuit upon a trial. *Salter v. Malcolm*, 596

79. A fee of \$10, not to be allowed for each time that a cause is noticed before a referee. *Anon*, 596

80. There may be a reference of any specific question in any action where the taking of a long account is necessary. *Bowman v. Sheldon*, 607

81. An attorney, who has an action

pending against a client for professional services, may have a reference for the purpose of ascertaining what amount of compensation he is entitled to, as attorney, for services and disbursements in the suits which he has conducted for the defendant. *id.*

82. The reference in such a case will be analogous to the former practice, in relation to the taxation of costs, where the questions of retainer and the ultimate right of the attorney to recover are reserved. *id.*

83. The amount thus reported will not necessarily be the limit of such recovery. *id.*

84. Where a cause involves the examination of a long account, it is no objection to a motion for a reference that it had once been tried by a jury. *Brown v. Bradshaw*, 635

85. When a reference has been made of a collateral matter, in order to carry a judgment into effect, the report of the referee must be confirmed, upon motion, at special term. *Belmont v. Smith*, 675

86. When exceptions are filed to the report, they must be heard, not as a calendar cause, but as a non-enumerated motion. *id.*

87. Regularly no exceptions can be filed, not founded upon objections taken before the referee. *id.*

88. An affidavit of a party setting forth the proceedings before the referee, cannot be received as the ground of a motion for setting aside the report. A special report of the evidence must be obtained from the referee. *id.*

Remittitur.

89. A remittitur regularly filed in the court below, will not be taken off after an order has been entered to execute the judgment of the appellate court, without a suggestion from such court, that the remittitur does not conform to its judgment, or has been irregularly issued. *Bogardus v. Rosendale Manfg. Co.*, 592

Submission of a Controversy.

90. The provision in the R. S. (2 R. S., § 37, p. 309), which made it the duty of the court, in which a judgment had been rendered in an action of ejectment, to vacate the same and grant a new trial upon the application of the party against whom the judgment was rendered, is applicable to actions for the recovery of real property under the Code. *Lang v. Ropke*, 701

91. But it is not applicable, when the judgment has been rendered in a controversy, submitted without action by the agreement of the parties. Code, § 372.

Not only is such a proceeding not an action, but the provision in the R. S., by its just construction, applies only to a judgment founded on the verdict of a jury. *id.*

92. So the new trial which the R. S. directs to be granted means a trial by a jury, but there can be no such trial, when the controversy has been submitted, since, by the express words of the Code, the case must then be heard and determined by the court at a general term. *id.*

93. The court has no power upon a motion, to release either of the parties from the legal effect of their submission, so as to enable them to litigate before a jury, the facts upon which they had agreed. *id.*

94. When a fraud or mistake is alleged, the court, as a court of equity, may have power to vacate the submission and the judgment, but this relief must be sought in a suit properly instituted for that purpose. *id.*

Summons.

95. Where the action is against an attorney for an account of moneys collected by him, the proper notice to be inserted in the summons is that prescribed by subdivision 2 in § 129 of the Code. *West v. Brewster*, 647

96. The complaint in such a case need not state the particulars of the account, nor is the plaintiff bound to fur-

nish a bill of particulars unless under a special order. *id.*

Trial.

97. The rules of the Supreme Court, relative to proceedings at circuits, apply to the trial terms of the Superior Court. *Smith v. Brown*, 665

S

SALES.

1. Before the Revised Statutes it was settled that the auctioneer, in public sales of property, was the agent of the buyer and seller, and the Revised Statutes (2 R. S. 185, § 8, 9), which require the note or memorandum of a contract of sale, to be subscribed by the party making it, or his authorized agent, is sufficiently complied with, when the entry by the auctioneer of the sale, in which the name of the principal appears, is signed by the auctioneer with his own name, without any reference to his character as agent. The intention to bind him, and not the auctioneer, is plain, and makes it the contract of the principal. *Pinckney v. Hagadorn*, 89

2. The rule of law, which requires an agent to sign the name of his principal, in the execution of instruments, is confined to writings under seal. *id.*

3. An auctioneer, upon the sale of real estate, made an entry in his book of sales of the name of the seller of the property, and in connexion therewith a description of the property, which consisted of five lots, which were sold at the sale to different purchasers, and the entries of which were made thereunder, in the following manner: "1 lot, corner of Avenue A, to W. J. \$2,010," underneath which were entries of the sales of three lots immediately adjoining, and then the following: "1 lot, next adjoining, J. L. P., \$1,350." *Held*, that the entry, in the position and connexion which it occupied in the sales book, signified that J. L. P. had become the purchaser of

- that lot, and sufficiently indicated that he was the highest bidder, and that the same was struck off to him. *id.*
4. *Held* also, that, taken in connexion with the description of the property contained in the entry of sales, it was a sufficient identification of the lot sold. *id.*
5. A mis-description in the first name of the seller does not invalidate the contract of sale. *id.*
6. The powers of an auctioneer are limited and special. But where the terms of sale provided that ten per cent. of the purchase money should be paid on the day of sale, *Held*, that the auctioneer's authority was not limited to receiving it on that day unless previously prohibited by the seller. *id.*
7. As a general rule, time is not so essential in executory contracts for the sale of land as to work a forfeiture on the omission to pay at the day stipulated. And until the seller does some act to make it essential, the buyer is at liberty to pay after that day. *id.*
8. The words "at the time of sale," in § 4 tit. 2 of the statute of frauds, must be strictly construed, and mean that the memorandum which is required to be made by an auctioneer shall be made *eo instanti* that the sale is completed. *Goelet v. Cowdrey*, 131
9. In this case, the price of the goods (a pair of horses) sold at auction exceeded \$50, and the memorandum of the auctioneer was not completed by the entry of the name of the person on whose account the sale was made until some hours after the sale. *Held* that, from the want of a sufficient memorandum or note in writing, the contract was void. *id.*
10. When, by the terms of the contract, the vendee was to direct at what places in the city of New York coal should be delivered; the designation of the places by a notice to the vendor before the time fixed for the delivery of the coal, is a condition precedent to his obligation to make the delivery. *West v. Newton*, 277
11. Hence, in an action claiming damages for the non-delivery of the coal, unless it is proved that the requisite notice was given in due time to the vendor, the plaintiff must be nonsuited. *id.*
12. Where the sale and delivery of goods, and the acceptance by the holder of the promissory note of a third person as a payment in full, are simultaneous acts, the presumption of law is, that the payment was meant to be absolute and final. *Noel v. Murray*, 385
13. The general rule, that the acceptance by a creditor of the bill or note of a third person does not operate, unless by an express agreement of the parties, as a satisfaction of a precedent debt, has no application to such a case. *id.*
14. When the sale and the delivery of the goods are simultaneous, the legal inference is that the acceptance of the note, as a final payment, was a part of the agreement, and a condition of the purchase. *id.*
15. If a receipt then given by the seller for the note, expressing it to have been received as a payment in full, may be contradicted at all, it can only be so, by proof of an express agreement that it should be held only as a collateral security. *id.*

STOCK.

1. A person who in good faith advances money to the holder of a certificate of stock to which a power of attorney is annexed, which is expressed to be for value received, and on its face is irrevocable, although the power is in blank as to the name of the attorney, acquires by the delivery to him as collateral security of the certificate and power, a valid title against the person by whom the power was executed, and in whose name the stock is standing. *Fatman v. Lobach*, 854
2. The lender in such a case has the right to believe that the holder of the certificate and power is the owner of the stock, and has an absolute right to hypothecate as well as to sell it.

8. He is therefore not bound to surrender the certificate and power to the original owner of the stock, unless upon the repayment with interest of his whole advance, although such owner may have satisfied the debt for which he had himself pledged the stock. *id.*

U

USURY.

See PLEADING, 2, 3, 6.

W

WITNESS.

1. A witness who, for a valid consideration, has agreed to indemnify the defendant by whom he is called, is incompetent under the Code "as a person for whose immediate benefit the action is defended." (Per Bosworth and Duer, J.J.) *Catlin v. Hansen*, 309
2. A consistent interpretation must be given to the two sections in the Code (§§ 848, 849), that which declares that "no witness shall be excluded by reason of his interest in the event of the suit," and that which excepts from the application of the rule those who are "parties to the action, or for whose immediate benefit it is prosecuted or defended." (Duer, J.) *id.*
3. *Semble*—that these provisions can only be reconciled by confining the exceptions from the general rule to those who, in judgment of law, are parties to the suit that is, as parties on the record, or parties in interest. (Duer, J.) *id.*
4. Those only, as parties in interest, are parties to the suit, who, in all respects and for all purposes, will be concluded by the judgment to be rendered. (Duer, J.) *id.*
5. The examination of parties as witnesses, or the production of their books, cannot be compelled, under the provisions of the Revised Statutes, to perpetuate testimony. *Keeler v. Dusenbury*, 660

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I am, unexpectedly, compelled to be absent from the United States for a couple of months, which I the more regret, as it prevents me from taking an active part in the publication and circulation of your new book of practice under the present Code. Having examined it thoroughly, whilst it was in the progress of completion, I can speak understandingly of its merits. It is much needed at present, and will, I feel sanguine, answer all the purposes for which it was intended. I shall, most cheerfully, recommend it to all my personal friends at the Bar.

Truly yours,

N. DANE ELLINGWOOD.

New-York, 4th May, 1852.
To HENRY WHITTAKER, Esq.

Having examined Mr. Whittaker's manuscript, I concur in Mr. Ellingwood's opinion of its merits, and cordially recommend it to the profession.

ROBT. J. DILLON.

I have examined 886 pages of Mr. Whittaker's new book of practice under the Code, and I very cheerfully give to it my cordial approval, and strongly recommend it to members of the profession, throughout the State, as an excellent and thorough guide through the complexities of the new system.

Mr. Whittaker had his office with me for some time, and I can speak knowingly of his excellent and extensive knowledge of the general principles of law, and of the accuracy and precision of his mind. I have not a doubt of the excellence and success of the work.

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